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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director

With this issue, year 2009 is about to say good bye to all of us as the Year 2010 is round the corner. Before it bids adieu to us, we must sit back and think about all the lessons that it has taught us. Every lesson learnt should be taken in the right spirit. ***Hal Borland*** has said *'Year's end is neither an end nor a beginning but a going on, with all the wisdom that experience can instill in us'.*

We have been entrusted with the work of judging other people's deeds. This is a job which is above anything else. Even God who has made us, judges our conduct or misconduct after our death. But we have the powers (subject to limitations) by which we can judge a man for all his acts in his lifetime. Simultaneously, it should not be forgotten that the greatest power accompanies the greatest responsibility. This is a very humble job and we should do it with all humility. So, a judicial officer should learn more and extract everything that will be beneficial in discharging his duties in a more effective way. The goal of the Institute is always to assist and satisfy the judicial officers in their quest for knowledge and learning. Therefore, the Institute prepared its academic calendar keeping in mind the present day need to face the challenges in discharging their duties in dispensation of justice.

This year the Institute organized a total of 21 training programmes by starting its academic activities with ***Foundation Course Training Programme*** for 10 Additional District Judges, who were directly appointed in the year 2008 in the month of January. The ***Second Phase Induction Training Programme*** for the newly appointed Civil Judges Class II of 2008 batch was conducted in the months of February and March which was later on followed by ***Refresher Course Training Programme*** for the last batch of Civil Judges Class II of 2007 in the month of May. ***Advance Course***

Training to all the Additional District Judges who were promoted and posted as Fast Track Judges was imparted in the months of June and July. Looking to the rise in the number of cases relating to dishonour of cheques, the Institute in the month of July organized a Workshop on ***Offences under Negotiable Instruments Act*** in which Judicial Magistrates participated. As per the directions of Hon'ble the Chief Justice, to make all the judicial officers computer friendly, the Institute embarked upon organizing a series of training programmes in ***Application of Information and Communication Technology to District Judiciary and Application of ADR & Plea Bargaining Mechanisms*** to all the Judicial Officers of the State. Six such trainings were organized this year. Apart from that, the Institute also imparted ***Refresher Course Training*** in six batches to all the Civil Judges of 2008 batch. In this year as nine Additional District & Sessions Judges have been directly appointed by the High Court, they were also called for ***Foundation Course Training*** along with three other Additional District Judges who got jump promotion. After completion of the ***Induction Training Programme*** to the Civil Judges of 2008 batch, 15 more Civil Judges were appointed and ***First Phase Induction Training*** was also imparted to them.

As we all know in Madhya Pradesh, Gram Nyayalaya Adhiniyam came into force from 2nd October, 2009. The idea behind the enactment of this Act is to provide quick, qualitative and inexpensive justice at the doorsteps of the villagers. Gram Nyayalayas have been established and invested with the powers of civil, criminal and labour court. To preside over these Nyayalays, Judicial Officers of the rank of Civil Judges Class II have been appointed as Nyayadhikaris. A seven days' training programme for these Nyayadhikaris was organized to sensitize them about the responsibilities which they will be shouldering while discharging their duties.

The Institute could organize all these training programmes only with the continuous guidance and blessings provided by Hon'ble

the Chief Justice Shri A.K. Patnaik, Hon'ble Shri Justice R.S. Garg, Administrative Judge and Chairman, High Court Training Committee and all other Hon'ble Judges of High Court. The Institute also got overwhelming support from the Registry Officers and judicial officers of the District Court. The Institute will always remain grateful to them for their kind co-operation and support.

In addition to that, the Institute associated itself with National Judicial Academy in organizing ***West Zone Judicial Conference on Enhancing Timely Justice: Strengthening Criminal Justice Administration*** at Indore from 31st October to 2nd November, 2009. The Criminal Justice Administration in our country is passing through a critical stage due to the problem of huge arrears of cases and consequent delay in dispensation of justice and large-scale acquittals. This Conference was organized to deliberate and discuss ways and means to tide over this situation. In this Conference, ninety Judicial Officers from the High Courts of Madhya Pradesh, Bombay, Gujarat and Rajasthan participated. In this three days Conference, Panel discussions on Key challenges faced by the Criminal Justice Administration and its causes and remedies, Role of Court in Criminal Justice Administration, Safeguarding Consistency, Objectivity and Certainty in Criminal Adjudication: Key Issues and Challenges and Sentencing and Safeguarding Constitutional Rights in Criminal Justice Administration, were held. The participants were sensitized on the above issues and the methodology that would be helpful in dealing with the problems that the system is afflicted with. The Conference proved to be beneficial as the participants of various States got a platform to express and exchange their ideas about the problems and came out with innovative solutions in dealing with the menace of mounting arrears of cases and preparing a strategy for strengthening the Criminal Justice Administration.

In this issue Part-I is replete with bi-monthly articles. With this sixth and final issue, 450 notes of the various pronouncements of

the Hon'ble Supreme Court as well as our High Court have been included in Part II of the journal covering all important areas of law to facilitate the Judicial Officers of the District Court. Notification regarding use of Amber Light by all the Judicial Officers finds place in Part III. A new Act, namely Gram Nyayalayas Act, 2008 which has been enacted for providing justice to the poor at the doorsteps finds place in Part IV of the Journal.

I wish all the readers a **VERY HAPPY AND PROSPEROUS NEW YEAR.** Let the year 2010 usher in all of us the spirit to work with lot of vigour and enthusiasm. This may be our resolution to work with whole heartedness and devotion. We should not look for our flaws, but explore our potential. Unless a man starts afresh about things, he will certainly do nothing effective. We should commit ourselves to the resolutions but flexible in our approach. Let me conclude with the words of **Edith Lovejoy Pierce** about New Year:

We will open the book.
Its pages are blank.
We are going to put words on them ourselves.
The book is called Opportunity and its first chapter is
NEW YEAR'S DAY!

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APPOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice I.S. Shrivastava and Hon'ble Shri Justice Piyush Mathur have been administered the oath of office by Hon'ble Shri Justice A.K. Patnaik, Chief Justice, High Court of Madhya Pradesh on 25th August, 2009 and 14th October, 2009, respectively, as Additional Judges of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur

Hon'ble Shri Justice I. S. Shrivastava has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 16-12-1949 at Bhind in the family of Advocates. Having taken B.Sc. and LL.B. Degrees, he practiced as an Advocate for 3½ years. On 14-8-1978 he joined Judicial Service as Civil Judge Class-II. He was promoted as Additional District Judge in the year 1991. He was appointed as Registrar, M.P. State Administrative Tribunal, Jabalpur from April 1997 to September 2004. In 2004 he was appointed as District and Sessions Judge. He was District Judge (Inspection and Vigilance), Gwalior Zone, prior to his elevation. Took oath as Additional Judge of the High Court of Madhya Pradesh on 25th August, 2009.

Hon'ble Shri Justice Piyush Mathur has been appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 12-3-1960 in the family of lawyers. His father late Shri Kailash Narayan Mathur (a Freedom Fighter) and his grandfather late Shri M.M.L. Mathur were eminent lawyers of Shajapur District, M.P. He passed his Higher Secondary School Examination in First Division from Government Higher Secondary School,

Shajapur and thereafter obtained B.A degree in 1980 from Pandit Balkrishna Sharma "Naveen" Government College, Shajapur by securing IV position in the Vikram University. He passed the Bachelor of Laws Examination from the same College in 1983 by securing distinction in several subjects and won Gold Medal in LL.B. Examination.

He was enrolled with the State Bar Council on 17-2-1984. He practiced for six years on Original Side by conducting original civil matters and variety of criminal trials in District Court and revenue matters. During 1989-1991 he practised in Supreme Court in Constitutional and Appellate Side. Thereafter, from 1992 he practised at Indore Bench of High Court of Madhya Pradesh.

He was appointed as Central Government Counsel as Additional Standing Counsel for Union of India (Bhabha Atomic Research Centre/Centre for Advance Technology, Indore) in their Land Acquisition Appeals before the High Court of Madhya Pradesh. From 1995 to 1998, he was Government Advocate at Indore Bench. He appeared for several local and corporate bodies. He has to his credit adequate experience of dealing matters concerning Army Officers' Service Disputes (including the Court Martial proceedings). During 1986-1988 he appeared in the Judicial Commission of Inquiry relating to communal riots, involving death of Police Sub-Inspector and incidents of arson, loot and fire at Shajapur, M.P. He was also appointed as Special Public Prosecutor for State of Madhya Pradesh in a famous Criminal Trial of Sadhvi Ritumbhara. Took oath as Additional Judge of the High Court of Madhya Pradesh on 14th October, 2009.

We, on behalf of JOTI Journal wish Their Lordships a very happy and successful tenure.

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PART - I

यथेष्ट मात्रा में गुणात्मक न्याय के आधारभूत तत्व

एस.एस. सिसोदिया
जिला एवं सत्र न्यायाधीश
शहडोल (म.प्र.)

यह सच है कि किसी कार्य के संपादन की मात्रा की अधिकता पर अधिक ध्यान देने से उसकी गुणवत्ता विपरीत रूप से प्रभावित होती है, परन्तु इसके साथ ही यदि किसी कार्य की संख्या निर्धारित न हो तो उसके न होने की या करने वाले की उसके प्रति गैरजवाबदार बनने की संभावना भी बनी रहती है। इसलिए किसी भी क्षेत्र में व्यक्ति के द्वारा किये गये कार्य की संख्या व गुणवत्ता दोनों ही अत्यंत महत्वपूर्ण कारक तत्व होते है। ये दोनों कर्ता की क्षमता, योग्यता व भावना पर निर्भर रहते हैं, क्योंकि संख्या, श्रम का एवं गुणवत्ता मस्तिष्क व हृदय का विषय होते हैं। ऐसी अवस्था में यदि इस संदर्भ में न्याय क्षेत्र को देखा जाये तो सर्वप्रथम न्यायाधीशों की भूमिका सर्वाधिक महत्वपूर्ण एवं गंभीर हो जाती है, चूंकि उन्हें केवल न्याय करना ही नहीं होता बल्कि वैसा वस्तुतः किया भी गया, यह दिखाना भी अनिवार्य रहता है। ऐसा करके ही विश्व व समाज को अपराध व विवाद मुक्त बनाया जाकर सर्वत्र सुख, शांति व स्मृद्धि स्थापित की जा सकती है। इस परिप्रेक्ष्य में एक सच्चे व अच्छे न्यायाधीश के लिए प्रमुख गुण–संत की तरह जीवन व घोड़े की तरह कर्मठता एवं तत्परता, परम आवश्यक है। जिनको धारण करने के लिए उसे अपने ज्ञान व कर्म में निपुण होना नितांत अनिवार्य व अपरिहार्य है। अतः जो भी इस क्षेत्र में है या आना चाहता है उसे उक्त अनुसार दक्षता व कुशलता अर्जित करना ही होगा अन्यथा वह अपना वांछित लक्ष्य न्याय दान करने का प्राप्त नहीं कर सकता तथा समाज को भी उनका वांछित लाभ न्याय पाने का नहीं मिल पायेगा, जो कि उसका व समाज का दुर्भाग्य ही होगा।

अब यदि ''ज्ञान'' पर विचार किया जाये तो न्यायाधीशों को अपने पेशेवर ज्ञान के साथ जीवन व जगत के मूलभूत सत्य अर्थात् अध्यात्म को गहराई से जानना व सीखना होगा। उन्हें अपने कर्म में मस्तिष्क व हृदय को भी जोड़ना होगा अन्यथा अपने कार्य को मात्र यंत्रवत निपटाने से तो उनका निराकरण ही हो सकता है, समाधान नहीं। किसी कार्य को हम किस भाव व उद्देश्य से एवं किस नीति व नियत से कर रहे है, यह उसकी सफलता व असफलता के लिए अत्यंत महत्वपूर्ण प्रश्न हमारे समक्ष विचार हेतु उत्पन्न होता है। यदि हम अपने कार्य को बोझ समझेंगे व मात्र अपनी आजीविका का साधन समझेंगे तो उसमें वह स्वाद एवं सुगंध नहीं आयेगी जो आना चाहिये एवं उसके अभाव में वह किसी को भी तुष्टि, पुष्टि व संतुष्टि भी नहीं दे पायेगा। अपने व्यावसायिक ज्ञान की अनिवार्यता के संबंध में ज्यादा कहने की आवश्यकता नहीं है क्योंकि उसके बिना तो एक कदम भी आगे बढ़ना संभव नहीं है। अब रहा प्रश्न अध्यात्मिक ज्ञान का तो यह स्पष्ट

है कि जो आया है उसे एक दिन जाना है एवं वह भी खाली हाथ, फिर पुण्य करने का अवसर प्राप्त होते हुए भी पाप कमाने का क्या औचित्य ? ईश्वरीय कृपा से हमें न्याय दान समान पवित्र कार्य मिला है व उससे हमारा पेट व परिवार भी भलीभांति पल रहा है तथा हम देवता की भांति पूजे जा रहे हैं तो फिर हमें अपनी पवित्रता, कार्य की शुचिता व जीवन की सार्थकता सिद्ध करनी ही होगी, इसके बाद तो सब कुछ स्वमेव आसान हो जायेगा। इस प्रकार के सर्व कल्याणकारी ज्ञान का अर्जन तो निरंतर अध्ययन, चिंतन, मनन व स्वाध्याय से ही संभव है एवं उसमें प्रमाद कभी उचित नहीं कहा जा सकता।

अब यदि ''कर्म'' पर विचार करें तो यह सुनिश्चित है कि प्रत्येक देहधारी को जन्म से लेकर मरण तक प्रत्येक क्षण कुछ न कुछ करना ही पड़ता है एवं वह निष्कर्म कदापि नहीं रह सकता तथा जैसा उसका कार्य होगा वैसा उसका फल भी अवश्यंभावी हैं । अतएव हमें अपने प्रत्येक कर्म पर पैनी दृष्टि रखकर उसे कुशलतापूर्वक करना होगा, यही ''योग'' है। इसके द्वारा हम अपने स्वार्थ को भी परमार्थ में बदल सकते हैं एवं यह ''जीवनकला'' सतत् अभ्यास व अध्य व्यवसाय से ही संभव हैं। हमारे कर्म की निर्मलता व प्रखरता ''निष्काम'' होकर कर्म करने तथा कीचड़ में भी कमल की तरह खिलने से संभव हैं। ऐसा भी नहीं है कि निष्काम हो जाने से हमारा जीवन निर्वाह किसी प्रकार से बाधित हो जाएगा। चूंकि हमारा वेतन व हमारी सुविधाएं तो, जब तक कि हम स्वयं अपने पैर पर कुल्हाड़ी न मारे व जिस नांव में सवार है उसमें छेद न करें तब तक, सर्वथा सुरक्षित ही हैं । यदि हम अपना कर्तव्य पालन आत्मा व परमात्मा को साक्षी रखकर व स्व–अनुशासित होकर पूर्ण निष्ठा व ईमानदारी से करेंगें तो हमें इस मृत्यु संसार सागर से सफलतापूर्वक तरने के लिए अन्य कोई प्रयास भी नहीं करना पड़ेगा, क्योंकि फिर हमारा कर्म ही पूजा बन जायेगा तथा हमारे कर्म की प्रकृति भी हमसे इसी की अपेक्षा करती हैं।

उक्त बातें तो न्यायाधीशों से संबंधित हो गई, अब रहा उनके कार्य के सही मूल्यांकन का प्रश्न तो यह उनके वरिष्ठों पर निर्भर रहता है एवं यदि वे उसमें किसी प्रकार से विफल रहते है तो यह और भी अधिक चिंता का विषय हो जाता है। क्योंकि यदि वे सही कार्य करने वाले को प्रोत्साहित व गलत कार्य करने वाले को हतोत्साहित करने में असफल रहते हैं तो इससे न्यायधीशों के साथ–साथ उनसे जुड़े अन्य व्यक्तियों के साथ भी अन्याय होने की पूर्ण संभावना बनी रहती है। इसलिए प्रत्येक न्यायाधीश के उचित मूल्यांकन हेतु उसके मूल्यांकनकर्ता का निष्पक्ष व न्याय प्रिय होना अत्यंत आवश्यक है अन्यथा यदि वह वैसा नहीं होगा तो उसका विपरीत प्रभाव सम्पूर्ण न्याय व्यवस्था पर भी पड़े बिना नहीं रहेगा।

अब यदि न्यायाधीशों के कार्य के मूल्यांकन के आधार व मापदण्ड पर विचार करें तो प्रत्येक न्यायाधीश के लिए सर्वप्रथम यह आवश्यक है कि वह अपने नियत समय पर कर्तव्य स्थल पर उपस्थित रहकर अपना पदीय कार्य पर्याप्त संख्या में पूर्ण आवश्यक गुणवत्ता के साथ, पूर्ण जवाबदारी के साथ, मन से व लगन से विधिवत संपादित करें तथा अन्य से भी वैसा कराने का हर संभव प्रयत्न करें। न्यायालय के अंदर व बाहर अपने कार्य व्यवहार एवं आचरण से ऐसे आदर्श मापदंड स्थापित करे जो उसके कार्य में सहायक

बनने के साथ अन्य के लिए भी प्रेरक बने। अपना स्वयं का एक आदर्श उदाहरण प्रस्तुत करके ही हम ऐसा करने में सफल हो सकते हैं। इन्हीं परिप्रेक्ष्य में किसी न्यायाधीश के अपनी संस्था को किए गये सकल योगदान का मूल्यांकन सर्वोत्तम, बहुत अच्छा, अच्छा, सामान्य व निकृष्ट श्रेणी के अंतर्गत किया जाना ही उचित होगा, न कि मात्र उसके द्वारा किये गये कार्य की संख्या के आधार पर। उसके दैनिक कार्य में एक बार न्यूनता व त्रुटि अवश्य क्षम्य हो सकती है परन्तु कदाचार कदापि नहीं क्योंकि इसमे समझौता किया जाना अत्यंत घातक हो सकता है।

उक्त दृष्टि से एक न्यायाधीश के मासिक संख्यात्मक कार्य सम्पादन के साथ–साथ उसके अन्य मूल्यांकन के निम्न आधार व मापदंड भी विचारणीय हो सकते हैं।

1. **व्यक्तिगतः**– समय की पाबंदी, कार्य एवं आचरण, क्षमता व दक्षता, संनिष्ठा, व्यक्तित्व एवं व्यवहार, कार्य व कर्मचारियों पर नियंत्रण, व्यक्तिगत समस्याएं व न्यूनताएं, शिकायत, सुझाव,

2. **कार्य संपादनः**– माह में परीक्षित साक्षियों की संख्या, बनाये गये वाद प्रश्नों की संख्या, लगाये गये आरोपों की संख्या, किए गए अभियुक्त परीक्षणों की संख्या, अन्य उल्लेखनीय कार्य/निरीक्षण, गुणवत्ता,

3. प्रत्येक न्यायाधीश के उपरोक्तानुसार मासिक गुणात्मक व संख्यात्मक प्रतिवेदन पर आवश्यकतानुसार उनको समय–समय पर अवगत कराते हुए उनकी वार्षिक गोपनीय चरित्रावली जिला न्यायाधीश द्वारा तैयार की जाये जिससे उनका समग्र मूल्यांकन समुचित रूप से किया जा सके व उनमें उत्तरोत्तर सुधार की संभावना भी बनी रहे। इस हेतु जिला न्यायाधीश को उनके जिले में पदस्थ न्यायिक अधिकारियों की संख्या आदि को देखते हुए उन्हें प्रशासनिक कार्य हेतु अधिक समय दिये जाने के लिए उनके न्यायिक कार्य में कुछ और छूट दिया जाना भी आवश्यक प्रतीत होता है। जिला न्यायाधीश के अतिरिक्त सर्तकता जिला न्यायाधीश द्वारा वर्ष में दो बार व पोर्ट फोलियो न्यायाधीश द्वारा एक बार प्रत्येक न्यायाधीश के कार्य व व्यवहार आदि का विस्तृत रूप से सूक्ष्म निरीक्षण किया जाना भी अनिवार्य किया जाना चाहिये। इसे मात्र औपचारिकता के रूप में नहीं देखा जा सकता अन्यथा किसी भी न्यायाधीश का उचित मूल्यांकन संभव नहीं हो पावेगा।

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SCOPE OF LIABILITY OF DIRECTORS AND OTHER OFFICIALS OF ANY COMPANY WITH RESPECT TO AN OFFENCE UNDER NEGOTIABLE INSTRUMENTS ACT, 1881 & PREVENTION OF FOOD ADULTERATION ACT, 1954

Judicial Officers
Districts Harda & Chhindwara*

INTRODUCTION:

The corporate bodies, such as a firm or company undertake series of activities that affect health, life, liberty & property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial & sociological sectors that amenability of the corporation to criminal law is essential to have a peaceful society with stable economy.

Ordinarily, a corporate body like a company acts through its Managing Director or Board of Directors or Authorized Agent or Servant and the criminal act or omission of an agent including his state of mind, intention, knowledge or belief ought to be treated as the act or omission including the state of mind intention, knowledge or belief of the company. These corporate bodies necessarily act through the human agency of their Directors, Officers & Authorized Agents and these officials may be held vicariously liable for the criminal wrong of their Company depending on the role played by them in the affairs of the Company.

PROVISIONS REGARDING LIABILITY OF DIRECTORS AND OTHER OFFICIALS OF ANY COMPANY WITH RESPECT TO AN OFFENCE UNDER NEGOTIABLE INSTRUMENTS ACT ARE GIVEN IN SECTION 141 WHICH READS AS UNDER:

> *S.141. Offences by companies.*– (1) If the person committing an offence under Sec. 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that

* The articles received from Harda and Chhindwara have been substantially edited and supplemented by the Institute.

he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1) where any offence under this Act has been committed by a Company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any Director, Manager, Secretary or other Officers of the Company, such Director, Manager, Secretary or other Officers shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. – For the purposes of this section, –

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

The officers responsible for conducting affairs of companies are generally referred to as Directors, Managers, Secretaries, Managing Directors etc. What is required to be considered is: is it sufficient to simply state in a complaint that a particular person was a director of the Company at the time of commission of the offence and nothing more is required to be stated? For this, it may be worthwhile to notice the role of a director in the company. The word 'Director' is defined in Section 2(13) of the Companies Act, 1956 as under:

> "director" includes any person occupying the position of director, by whatever name called";

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to powers of Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to that particular company depends upon the role and functions assigned to Directors as per the Memorandum and Articles of Association of the company. There is nothing which suggests that simply by being a director in a Company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know

anything about day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the Company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committee consisting of one or two directors out of the Board of the Company who may be made responsible for day-to-day functions of the Company. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts of each case. There is no universal rule that a director of a company is in charge of its everyday affairs. It all depends upon respective roles assigned to the officers in a company. A company may have a number of Managers or Secretaries for different departments. These officers may also be authorised to issue cheques under their signatures with respect to affairs of their respective departments. Will it be possible to prosecute a Secretary of Department-B regarding a cheque issued by the Secretary of Department-A? The Secretary of Department-B may not be knowing anything about issuance of such cheque in question. Therefore, in a complaint petition, without stating further more, mere mentioning the particular designation of an officer of the Company is not enough. When the requirement of Section 141, which extends the liability to officers of a company, is that such a person should be in charge of and responsible to the company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he satisfies those requirements? Every person connected with a Company cannot be made liable under Section 141. Liability is cast upon a person who may have something to do with the transaction complained of. A person who is in charge of and responsible for conduct of business of a Company would naturally knew why the cheque in question was issued and how it got dishonoured.

The question under our consideration came up before a three-Judge Bench of Hon'ble Supreme Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89 = AIR 2005 SC 3512* where in upon consideration of large number of decisions, Hon'ble the Supreme Court has opined: (pp.98-99, paras 10-11) as follows: –

> "10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are 'every person'. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words: 'Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence', etc;

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, will be liable for criminal action. It follows from this that if a Director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary in a company is liable' .... , etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in the commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for directors, manager, secretaries and other officers of a company to cover them in cases of their proved involvement."

The Apex Court finally clarified the legal position as under:

(a) It is necessary to specifically aver in a complainant under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141.

(d) So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

Prior to this, the Apex Court in *Monaben Ketanbhai Shah and another v. State of Gujarat and others, (2004) 7 SCC 15* has also clarified that the averments in complaint as per sub-section (1) of Section 141 Negotiable Instruments Act should be substantially complied with. It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirement of Section 141, the complaint has to proceed and accused is required to be tried with.

In *S.V. Muzumdar and others v. Gujarat State Fertilizer Co. Ltd. and another, 2005 (3) MPLJ 271 (SC)* it has been held that:–

> "Whether a person is in charge of or is responsible to the company' for conduct of the business is to be adjudicated on the basis of materials to be placed by the parties. Sub-section (2) of section 141 is a deeming provision which operates in certain specified circumstances. Whether the requirements for the application of the deeming provision exist or not is again a matter for adjudication during trial. Similarly, whether the allegations contained are sufficient to attract culpability is a matter for adjudication at the trial."

Under the Scheme of the Act, if person committing an offence under section 138 of the Act is a company: by application of section 141 it is deemed that every person who is in charge of and responsible to the company for conduct of the business of the company as well as the company are guilty of the offence. A person who proves that the offence was committed without his knowledge or that he had exercised all due diligence is exempted form becoming liable by operation of the proviso to sub-section (1). The burden in this regard has to be discharged by the accused.

This aspect of the matter has also been considered by the Apex Court in *Sabitha Ramamurthy v. R.B.S. Channabasavaradhya, AIR 2006 SC 3086* as under :-

> "Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefore. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted."

Further, it has also has been held that:

> "It may be true that it is not necessary for the complainant to specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the Court to arrive at a prima facie opinion that the accused is vicariously liable. Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in

> the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted. In terms of Section 200 of the Code of Criminal Procedure, the complainant is bound to make statement on oath as to how the offence has been committed and how the accused person are responsible therefor."

In *Saroj Kumar Poddar v. State (NCT of Delhi), (2007) 3 SCC 693,* the Apex Court has observed that the complaint pertains not only to certain averments satisfying the requirements of Section 141 of the Negotiable Instruments Act, it must also show as to how and in what manner the accused was responsible for the conduct of the business of the Company or otherwise responsible in this regard to its functioning, but the Apex Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla,(2007) 4 SCC 70* has clarified the position in this regard and has specifically held that in *Saroj Kumar Poddars case* (supra) no such general law was laid therein.

In *DCM Financial Services Limited v. J.N. Sareen and another, (2008) 8 SCC 1,* it has been held that Section 141 of the Act provides for a 'constructive liability'. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance being a penal one. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under Section 141 of the Act. This proposition has also been held in *K. Srikanth Singh v. North East Securities Ltd., (2007) 12 SCC 788.*

Honble the Supreme Court in *N.K. Wahi v. Shekhar Singh, (2007) 9 SCC 481,* in para 8 of page 483 has also observed as follows:-

> "8. To launch a prosecution therefore, against the alleged Directors there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are in-charge and responsible for the conduct of the business of the company. The description should be clear. It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case. But still, in the absence of any averment or specific evidence the net result would be that complainant would not be entertainable."

Recently in this regard after referring to its previous pronouncements, the Apex Court in *K.K. Ahuja v. V.K. Vora and anr., (2009) 10 SCC 48* has held that:

The position under Section 141 of the Act can be summarised thus:–

(i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix "Managing" to the word "Director" makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.

(iii) In the case of a Director, Secretary or Manager (as defined in Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under section 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under section 141(2) by making necessary averments relating to consent or connivance or negligence, in the complaint, to bring the matter under that sub-section.

(iv) Other Officers of a company can not be made liable under sub-section (1) of section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their role in regard to the issue and dishonour of the cheque, disclosing consent, connivance or negligence.

DEFENCES/EXCEPTIONS UNDER NEGOTIABLE INSTRUMENTS ACT:

Section 141 itself provides three defences or exceptions for vicarious liability to avoid punishment to a person prosecuted which are as under:

(i) If he proves that the offence was committed without his knowledge;

(ii) If he proves that he had exercised all due diligence to prevent the commission of such offence; and

(iii) Where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

PROVISIONS REGARDING LIABILITY OF DIRECTORS AND OTHER OFFICIALS OF COMPANY WITH RESPECT TO AN OFFENCE UNDER SECTION 17 OF PREVENTION OF FOOD ADULTERATION ACT, 1954 AND RULE 12-B OF PREVENTION OF FOOD ADULTERATION RULES, 1955 ARE AS UNDER:

Section 17. Offences by companies.– (1) Where an offence under this act has been committed by a company–

(a) (i) The person, if any, who has been nominated under Sub-sec. (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as the person responsible), or;

(ii) Where no person has been so nominated, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company: and.

(b) the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Any company may, by order in writing, authorise any of its directors or managers (such manager being employed mainly in a managerial or supervisory capacity) to exercise

all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Local (Health) Authority, in such form and in such manner as may be prescribed, that it has nominated such director or manager as the person responsible, along with the written consent of such director or manager for being so nominated.

Explanation. – Where a company has different establishments, or branches or different units in any establishment or branch, different persons may be nominated under this sub-section in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.

(3) The person nominated under Sub-sec. (2) shall, until –

(i) further notice cancelling such nomination is received from the company by the Local (Health) Authority; or

(ii) he ceases to be a director or, as the case may be, manager of the company; or

(iii) He makes a request in writing to the Local (Health) Authority, under intimation to the company, to cancel the nomination [which request shall be complied with by the Local (Health) Authority].

Provided that where such person ceases to be a director or, as the case may be, manager of the company, he shall intimate the fact of such cesser to the Local (Health) Authority:

Provided further that where such person makes a request under Clause (iii), the Local (Health) Authority shall not cancel such nomination with effect from a date earlier than the date on which the request is made.

(4) Notwithstanding anything contained in the foregoing sub-sections where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officers of the company, (not being a person nominated under sub-section 2) such director, manager, secretary or other officers shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.– For the purposed of this Section –

(a "Company" means any body corporate and includes a firm or other association of individuals;

(b) "Director", in relation to a firm, means a partner in the firm; and;

(c) "Manager" in relation to a company engaged in hotel industry, includes that person in charge of the catering department of any hotel managed or run by it.

Prevention of Food Adulteration Rules, 1955

Rule 12-B. – Form of nomination of Director or Manager and his consent, under Section 17. – (1) A company may inform the Local (Health) Authority of the concerned local area, by notice in duplicate, in Form VIII containing the name and address of the Director or Manager, who has been nominated by it under sub-section (2) of Section 17 of the Act to be in charge of, and responsible to, the Company for the conduct of the business of the company or any establishment, branch or unit thereof:

Provided that no such nomination shall be valid unless the Director or Manager who has been so nominated, gives his consent in writing and has affixed his signature, in Form VIII in duplicate in token of such consent.

(2) The Local (Health) Authority shall sign and return one copy of the notice in Form VIII to the company to signify the receipt of the nomination and retain the second copy in his office for record.

SIMILARITIES AND DISSIMILARITIES BETWEEN THE PROVISIONS OF NEGOTIABLE INSTRUMENTS ACT AND PREVENTION OF FOOD ADULTERATION ACT:

So far as liabilities of the Directors or other Officials under Section 17 (1) (a) (ii) and Section 17 (4) of Prevention of Food Adulteration Act are concerned, these provisions are similar to Sections 141 (1) and 141 (2) of Negotiable Instruments Act and legal position in this regard is also similar as discussed herein above.

Similarly first two exceptions/defences in Negotiable Instruments Act and Prevention of Food Adulteration Act are common whereas in Negotiable Instruments Act as per Second Proviso of Section 141 (1), one more exception as mentioned above is prescribed.

Similarly in both the Sections under Section 141 Negotiable Instruments Act and Section 17 of Prevention of Food Adulteration Act, in the last by way of explanation for the purpose of these Sections (a) Company and (b) Director are commonly clarified whereas in Prevention of Food Adulteration Act one more category (c) Manager in relation to a Company engaged in hotel industry is also clarified.

But provisions of Sections 17 (1) (a) (i), 17 (2) and 17 (3) of the Prevention of Food Adulteration Act are different from Negotiable Instruments Act and prescribes a peculiar provision for criminal liability through nomination (authorization) by the Company in writing of any of its Directors or Managers to exercise all such powers and take all such steps as are necessary or expedient to prevent the commission of any offence by Company under this Act with certain conditions.

In the case of *R. Banerjee and others v. H.D. Dubey, AIR 1992 SC 1168,* it has been held by the Supreme Court that from the scheme of Section 17 of PFA it is clear that where a company has committed an offence under the Act, the person nominated by the company u/s 17(2) of the Act to be in-charge of and responsible to the company for the conduct of its business shall be proceeded against unless it is shown that the offence was committed with the consent / connivance/ negligence of any other Director, Manager, Secretary or Officer of the company in which case the said person can also be proceeded against and punished. If no person has been nominated u/s 17(2), then every person who at the time of the commission of the offence was in-charge of and was responsible to the company for the conduct of its business can be proceeded against. It was held that where nomination u/s 17(2) made by company has not been acted upon on the ground that it was faulty and the directors were prosecuted and there was no allegations in the complaint that the offence was committed by the consent/ connivance/negligence of the directors, Section 17(4) will not be attracted.

In *Municipal Corporation of Delhi v. Rameshwar Rohatgi, AIR 1983 SC 167,* the company product was found adulterated and there was no evidence to show that its directors were directly involved or vicariously liable, it was held by the Supreme Court that the manager of the company being in-charge of its affairs was liable. Section 7 of 'PFA Act' provides that "No person shall himself or by any person on his behalf' manufacture for sale or store, sell or distribute any adulterated food etc. The question arises as to who is included by the phrase "by any person on his behalf". In *State (Delhi Administration) v. L.K Nagia, AIR 1979 SC 1977,* The Supreme Court held that by 'any person on his behalf' in Section 7 (1) of 'PF A Act' includes "agents and servants". In this case it was also held that section 17(2) of 'PF A Act' imposes a duty upon a company to nominate a person in relation to different establishments, or branches or units, the employment of word 'may' means 'must'. It was also held that in case of "Company Prosecution" notwithstanding the nomination of person responsible under Section 17 (2), there could also be prosecution of any Director, Manager, Secretary or the other officers

of the Company under Section 17 (4). But in such a case it is necessary that the prosecution has to prove that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of such person.

[Also see : *Hindustan Food Products India v. State of M.P. and another, 2008 (2) MPLJ 63 = 2008 CriLJ 2724, Food Inspector, Cuttack Municipality v. M/s. B.P. Oil Mills Limited, 1996 FAJ 200 = 1995 (1) FAC 83 (Ori)* and *Gopi Lal & Anr. v. State & Ors., 1999 (2) FAC 300*]

In *Azim H. Premji & Ors. v. State of Maharashtra, 2003 FAJ 156 (Bom) = 2002 (1) FAC 44 (Bom)* in paras 36 & 37 on pages 169-170, it has been held that :-

> **Nomination unless acknowledged is not valid nomination** – The nomination requires acknowledgment from the Local (Health) Authority. The Local (Health) Authority has to examine whether the nomination is in order and in case the nomination is in order the same is accepted and in token of having accepted the same the receipt of the nomination is acknowledged.
>
> **No presumption can be drawn merely on filing list of Directors.** – If the prosecution deems the petitioner to be guilty of the offence and liable to be tried and punished, it should show by placing requisite material on record that the petitioner was nominated as u/s 17 (2) in charge and responsible for the conduct of the business of the accused company or even otherwise without nomination the petitioner was in-charge of and responsible for the conduct of the business of the company. The prosecution has not produced any documentary evidence or otherwise or even has not made any averment that the petitioner was liable to be proceeded against and punished being in-charge of and responsible for the conduct of the business of the company. There is no averment also that she was nominated by the company in the prescribed manner with a notice to the Local (Health) Authority as envisaged under sub-section (2) of section 17 of the Prevention of Food Adulteration Act. No presumption can be drawn merely on the basis of the list of Directors filed by Assistant Commercial Taxation Officer that the petitioner was either nominated or de facto in-charge of and responsible to the company for the conduct of the business.

In *Govinda Rao v. Food Inspector, 2002 FAJ 240 = 2002 (1) FAC 280 (Ker) = 2003 (1) EFR 471* on page 245, it has been held in para 43 as follows :-

Offence committed by company with connivance of Director, Officer liable for punishment. – If a person has been nominated under Sub-sec. (2) of Sec. 17 of the Act, that person and the company shall be deemed to be guilty of the offence. The person so nominated to be in charge of and responsible to the company for the conduct of the business of the company shall be responsible for the commission of the offence under the Act. The responsibility to exercise all powers and to take all steps as may be necessary or expedient to prevent the commission by the company of any offence under the Act when there is a nomination is on the nominee because he is in charge of and responsible to the company for the conduct of the business. In cases in which there is nomination the partners of the firm other than the nominee cannot be said to be in charge of and responsible to the company for the conduct of the business of the company and hence prosecution against those partners by saying that they are also responsible to the company for the conduct of the business is not possible. But where an offence under the Act has been committed by a company and it is shown that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of any Director, Manager, Secretary or other officer of the company they shall also be deemed to be guilty of that offence and they shall be liable to be proceeded against.

CONCLUSION:

With the above discussion we can conclude that in both the Acts apart from the Company or Firm every person who at the time of commission of offence was in charge of and responsible to the company or firm for the conduct of its business, or, if such person is Director, Manager, Secretary or other Officers of the company or firm and offence is committed with his consent or connivance or any neglect on his part, or, if a person has been nominated under Section 17(2) of Prevention of Food Adulteration Act, then such person is liable to be prosecuted and punished. For offences committed by the companies under the aforementioned Acts, the liability of such person is co-extensive with that of the corporate body.

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आदेश 39 नियम 1 एवं 2 व्यवहार प्रक्रिया संहिता, 1908 के अंतर्गत निर्णय पारित करने के उपरांत अस्थाई निषेधाज्ञा जारी करने के मामले एवं परिस्थितियाँ

न्यायिक अधिकारीगण
झाबुआ

इस प्रश्न पर विचार करने के पूर्व आदेश 39 नियम 1 एवं 2 व्य.प्र.सं. के प्रावधानों का उल्लेख करना उचित होगा। आदेश 39 नियम 1 सी.पी.सी. के प्रावधान इस प्रकार हैं :–

''जहाँ किसी वाद में शपथ–पत्र द्वारा या अन्यथा यह साबित कर दिया जाता है कि –

क – वाद में वादग्रस्त किसी सम्पत्ति के बारे में खतरा है कि वाद का कोई भी पक्षकार उसका दुर्व्ययन करेगा, उसे नुकसान पहुंचायेगा या अन्य संक्रान्त करेगा या डिक्री के निष्पादन में उसका सदोष विक्रय कर दिया जावेगा, अथवा

ख – प्रतिवादी अपने लेनदारों को कपटपूर्वक वंचित करने की दृष्टि से अपनी सम्पत्ति को हटाने या व्ययनित करने की धमकी देता हो या आशय रखता हो,

ग – प्रतिवादी वादी को विवादग्रस्त किसी सम्पत्ति से बेकब्जा करने की या वादी को उस सम्पत्ति के संबंध में अन्यथा क्षति पहुँचाने की धमकी देता हो,

वहाँ न्यायालय ऐसे कार्य को अवरूद्ध करने के लिए आदेश द्वारा अस्थाई व्यादेश दे सकेगा या सम्पत्ति को दुर्व्ययित किया जाने, नुकसान पहुँचाये जाने, विक्रय किये जाने, हटाये जाने या व्ययनित किये जाने से अथवा वादी को वाद में विवादग्रस्त सम्पत्ति से बेकब्जा करने या वादी को उस सम्पत्ति के संबंध में अन्यथा क्षति पहुँचाने से रोकने और निवारित करने के प्रयोजन से ऐसा अन्य आदेश जो न्यायालय ठीक समझे तब तक के लिए कर सकेगा जब तक कि उस वाद का निपटारा न हो जाये या जब तक कि अतिरिक्त आदेश न दे दिया जावे।''

आदेश 39 नियम 1 सी.पी.सी. का प्रारंभ ही इन शब्दों से होता है कि जहाँ किसी वाद में शपथ–पत्र द्वारा या अन्यथा साबित कर दिया जाता है कि.....। इसी नियम की अंतिम दो पंक्तियों अनुसार न्यायालय अस्थाई व्यादेश या अन्य आदेश तब तक के लिए कर सकेगा जब तक कि वाद का निपटारा न हो जावे। इन शब्दों से स्पष्ट है कि इस प्रावधान के अंतर्गत वाद का लंबित होना एक आवश्यक शर्त है और अस्थाई व्यादेश वाद के निपटारे तक ही दिया जा सकता है। अतः आदेश 39 नियम 1 सी.पी.सी. के प्रावधानों को देखते हुए निर्णय पारित करने के पश्चात् निर्णय पारित करने वाला न्यायालय कार्यनिवृत्त (Functus Officio) हो जाता है और वह न्यायालय निर्णय पारित करने के पश्चात् उसी मामले में अस्थाई व्यादेश जारी नहीं कर सकता।

अतः निर्णय पारित होने के पश्चात् आदेश 39 नियम 1 सी.पी.सी. के प्रावधानों अनुसार किसी भी प्रकार के प्रकरण में किन्हीं भी परिस्थितियों में अस्थाई व्यादेश जारी नहीं किया जा सकता है। निर्णय पारित करने वाला न्यायालय उसके द्वारा पारित आज्ञप्ति के निष्पादन को कुछ निश्चित शर्तों पर सीमित समय के लिए आदेश 41

नियम 5 (2) सी.पी.सी. के अनुसार स्थगित कर सकता है पर यह एक पृथक विषय है और आदेश 39 नियम 1 सी.पी.सी. के अंतर्गत व्यादेश नहीं है।

आदेश 39 नियम 2 सी.पी.सी. के प्रावधान निम्नानुसार हैं :–

> **आदेश 39 नियम 2 (1)** :– संविदा भंग करने से या किसी भी प्रकार की अन्य क्षति करने से प्रतिवादी को अवरूद्ध करने के किसी भी वाद में, चाहे वाद में प्रतिकर का दावा किया गया हो या नहीं किया गया हो, वादी प्रतिवादी को परिवादित संविदा भंग या क्षति करने से या कोई भी संविदा भंग करने से या तद्रूप क्षति करने से जो उसी संविदा से उद्भूत होती हो या उसी सम्पत्ति या अधिकार से संबंधित हो अवरूद्ध करने के लिए अस्थाई व्यादेश के लिए न्यायालय से आवेदन, वाद प्रारंभ होने के पश्चात् किसी भी समय और निर्णय के पहले या पश्चात् कर सकेगा।
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> **आदेश 39 नियम 2 (2)** :– न्यायालय ऐसा व्यादेश ऐसे आदेश की अवधि के बारे में, लेखा करने के बारे में प्रतिभूति देने के बारे में ऐसे निबंधनों पर या अन्यथा, जो न्यायालय ठीक समझे, आदेश द्वारा दे सकेगा।

आदेश 39 नियम 2 सी.पी.सी. के प्रावधानों से निम्नांकित स्थिति स्पष्ट होती है :–

क – संविदा भंग करने से या किसी अन्य प्रकार की क्षति करने से प्रतिवादी को अवरूद्ध करने का वाद हो,

ख – वादी प्रतिवादी को परिवादित संविदा भंग या क्षति करने से या कोई संविदा भंग करने से या उसी प्रकार की कोई क्षति करने से जो उसी संविदा से उद्भूत होती हो, अवरूद्ध करने के अस्थाई व्यादेश के लिए न्यायालय से आवेदन कर सकेगा।

ग – वादी ऐसा आवेदन वाद प्रारंभ होने के पश्चात् किसी भी समय निर्णय के पहले या पश्चात् प्रस्तुत कर सकेगा।

अतः इन प्रावधानों को देखते हुए आदेश 39 नियम 2 के अंतर्गत आने वाले मामलों में निर्णय पारित होने के पश्चात् भी उसी न्यायालय में अस्थाई निषेधाज्ञा का आवेदन प्रस्तुत कर अस्थाई निषेधाज्ञा की मांग की जा सकती है। प्रश्न यह है कि इस प्रकार की अस्थाई निषेधाज्ञा की मांग किन मामलों में की जा सकती है और न्यायालय द्वारा प्रदान की जा सकती है ?

इन प्रश्नों पर विचार किया जावे तो इन प्रश्नों का उत्तर भी आदेश 39 नियम 2 सी.पी.सी. के प्रावधानों में ही समाहित है। इन प्रावधानों के अनुसार :

क – संविदा भंग करने से रोकने के लिए वाद हो या

ख – कोई अन्य क्षति करने से प्रतिवादी को अवरूद्ध करने के लिए वाद हो।

इन दो प्रकार के वादों में ही निर्णय पारित होने के पश्चात् भी अस्थाई निषेधाज्ञा आवेदन–पत्र वादी द्वारा प्रस्तुत किया जा सकता है। इन प्रावधानों को देखते हुए किसी अन्य प्रकृति के वाद में इस प्रकार का आवेदन प्रस्तुत किया जाना सम्भव नहीं है।

आदेश 39 नियम 2 सी.पी.सी. में किसी प्रकार की अन्य क्षति से संबंधित वाद का भी उल्लेख किया गया है। किसी अन्य क्षति को सी.पी.सी. में कहीं परिभाषित नहीं किया गया है। Black's Law Dictionary 4th Ed. P 924 एवं अन्य वरिष्ठ न्यायालय द्वारा प्रतिपादित न्याय–दृष्टांत के आलोक में क्षति का तात्पर्य किसी भी दोषपूर्ण कृत्य से है जो दूसरों को क्षति पहुंचाता हो और यह क्षति किसी व्यक्ति के शरीर, अधिकार, ख्याति या सम्पत्ति से संबंधित हो सकती है। अतः इस प्रकार की यदि कोई क्षति कारित होती हो और उसे निवारित करने के लिए वाद हो तो आदेश 39 नियम 2 सी.पी.सी. के प्रावधान अनुसार निर्णय पश्चात् भी अस्थाई व्यादेश के लिए आवेदन दिया जा सकता है।

अब यह प्रश्न विचारणीय है कि निर्णय पारित करने के पश्चात् किन परिस्थितियों में अस्थाई व्यादेश की मांग उसी न्यायालय में की जा सकती है और उसी न्यायालय द्वारा जारी किया जा सकता है। इस प्रश्न पर विचार किया जावे तो व्यावहारिक एवं विधिक रूप से निम्नलिखित परिस्थितियाँ हो सकती हैं :–

- *Laymen's Evangelical Fellowship v. J. Kishorilal, ए.आई.आर. 1989 मद्रास 105* में माननीय मद्रास उच्च न्यायालय द्वारा प्रतिपादित किया है कि यदि वादी का स्थाई व्यादेश का वाद गुण–दोषों पर निरस्त कर दिया गया हो तब भी वादी अपील प्रस्तुत करने और अपीलीय न्यायालय से स्थगन लाने तक आदेश 39 नियम 2 सी.पी.सी. के अनुसार उसी न्यायालय से अस्थाई व्यादेश की मांग कर सकता है। इस न्याय दृष्टांत से प्रकट होता है कि वादी का दावा निरस्त होने के बाद भी यदि न्यायालय का यह समाधान हो जाता है कि यथास्थिति भंग होने की दशा में वादी को कोई साम्पत्तिक या शारीरिक क्षति होने की संभावना है तो अपील प्रस्तुत करने और अपीलीय न्यायालय से कोई आदेश प्राप्त करने तक एक निश्चित समय के लिए आदेश 39 नियम 2 सी.पी.सी. के अनुसार यथास्थिति बनाये रखने संबंधी अस्थाई व्यादेश जारी किया जा सकता है।
- आदेश 39 नियम 2 सी.पी.सी. का शीर्षक इस संबंध में महत्वपूर्ण है। शीर्षक इस प्रकार है – **"भंग की पुनरावृत्ति या जारी रखना अवरूद्ध करने के लिए व्यादेश"** इस शीर्षक से ध्वनित होता है कि यदि संविदा भंग करने से रोकने के लिए या उस भंग को जारी रखने से अवरूद्ध करने के लिए न्यायालय द्वारा वाद में आज्ञप्ति पारित हो चुकी हो और उसके पश्चात् प्रतिवादी उसी भंग की पुनरावृत्ति करता हो तो वादी बिना वाद प्रस्तुत किये उसी न्यायालय में उस भंग को रोकने के लिए अस्थाई व्यादेश की मांग कर सकता है।
- जहां किसी संविदा के विनिर्दिष्ट पालन के वाद में विनिर्दिष्ट पालन का निर्णय एवं आज्ञप्ति दी जा चुकी हो और प्रतिवादी निर्णय पारित होने के पश्चात् वादग्रस्त सम्पत्ति की स्थिति में किसी भी प्रकार से परिवर्तन कर रहा हो या उस सम्पत्ति से सम्बद्ध किसी सम्पत्ति को हटाने का प्रयास कर रहा हो तो वादी उसके पक्ष में पारित आज्ञप्ति के निष्पादन तक प्रतिवादी के इस कृत्य को रोकने के लिए उसी न्यायालय से आदेश 39 नियम 2 सी.पी.सी. के अनुसार अस्थाई व्यादेश की मांग कर सकता है।

- निष्कासन के वाद में भवन स्वामी के पक्ष में आज्ञप्ति पारित होने के पश्चात् यदि प्रतिवादी को रिक्त आधिपत्य दिया जाने के ओदश की अवधि में प्रतिवादी वादग्रस्त भवन में या दुकान में कोई परिवर्तन करता है या आधिपत्य किसी को सौंपता है तो उस स्थिति में भी वादी आदेश 39 नियम 2 सी.पी.सी. के प्रावधानों अनुसार प्रतिवादी को इस कृत्य के प्रतिबंधित करने के लिए उसी न्यायालय से अस्थाई निषेधाज्ञा की मांग कर सकता है।
- जहाँ भागीदारी फर्म के विघटन का वाद हो, लेखाओं के लिए वाद हो, बंटवारे के लिए वाद हो और प्रारंभिक डिक्री पारित हो चुकी हो तो प्रारंभिक डिक्री पारित होने के पश्चात् अंतिम डिक्री पारित होने तक यदि वादग्रस्त सम्पत्ति, लेखा या किसी अन्य वस्तु की यथास्थिति को परिवर्तित किया जाता है या ऐसा प्रयास किया जाता है तब भी वादी प्रारंभिक आज्ञप्ति एवं निर्णय पारित होने के पश्चात् उसी न्यायालय से अस्थाई निषेधाज्ञा की मांग कर सकता है।

अतः इन उपरोक्त परिस्थितियों में निर्णय पारित होने के पश्चात् भी आदेश 39 नियम 2 सी.पी.सी. के प्रावधानों अनुसार अस्थाई व्यादेश की मांग की जा सकती है और न्यायालय द्वारा जारी किया जा सकता है।

उपरोक्त विवेचन के आधार पर यह निष्कर्ष दिया जा सकता है कि कोई वाद –

क – संविदा भंग करने से रोकने के लिए प्रस्तुत किया गया हो या

ख – कोई अन्य क्षति जिसमें शारीरिक, साम्पत्तिक या विधिक अधिकार से संबंधित क्षति सम्मिलित है कारित करने से रोकने का वाद हो तो उस वाद में निर्णय पारित किये जाने के पश्चात् भी भंग की पुनरावृत्ति या भंग को जारी रहने से अवरूद्ध करने के लिए अस्थाई व्यादेश जारी किया जा सकता है।

ऐसे वाद में निम्न परिस्थितियों में अस्थाई व्यादेश निर्णय पश्चात् जारी किया जा सकता है:–

क – वादी के पक्ष में डिक्री पारित होने के पश्चात् प्रतिवादी उसी संविदा भंग की पुनरावृत्ति करता हो या करने का प्रयास करता हो।

ख – वादी को कोई अन्य क्षति कारित करने से रोकने का निर्णय एवं डिक्री पारित हुई हो और प्रतिवादी पुनः वही क्षति पहुंचाने का कोई कृत्य करता हो या उसका प्रयास करता हो।

ग – वादी का वाद निरस्त हुआ हो और न्यायालय का समाधान हो कि अपीलीय न्यायालय से स्थगन लाने तक यथास्थिति कायम रखना उचित है तो वादी के पक्ष में एक निश्चित समय तक अस्थाई व्यादेश दिया जा सकता है।

घ – ऐसे वाद जिनमें प्रारंभिक डिक्री पारित हुई हो और अंतिम डिक्री पारित होने के बीच प्रतिवादी वादग्रस्त विषयवस्तु में कोई संपरिवर्तन करने का प्रयास करता हो।

ड. – निष्कासन वाद में भवन स्वामी के पक्ष में डिक्री हो और प्रतिवादी को रिक्त आधिपत्य दिये जाने हेतु विधि अनुसार निश्चित समय दिया गया हो, उस दौरान प्रतिवादी वादग्रस्त भवन में कोई संपरिवर्तन करता हो या किसी को आधिपत्य सौंपता हो तब भी वादी उसी न्यायालय से अस्थाई व्यादेश की मांग कर सकता है।

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LAW RELATING TO POWERS AND JURISDICTION OF COURT MARTIAL AND ORDINARY CRIMINAL COURT IN CONNECTION WITH THE TRIAL OF AN OFFENCE WHICH FALLS UNDER THE JURISDICTION OF BOTH THE COURT MARTIAL AND THE CRIMINAL COURT

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Though military personnel are governed by military laws *viz.* Army Act, 1950, Air Force Act, 1950, Navy Act, 1957 but as citizens, they are also governed by the penal laws of the country. Certain act(s) and omission(s) of military personnel are made punishable under the military laws but there are certain acts and omissions which are punishable both under military laws as well as under penal laws of the country. For specific act or omission in specified military law, jurisdiction for trial lies with court martial and for trial of other offences, both court martial and ordinary criminal court have jurisdiction.

According to various military enactments as mentioned above "civil offence" means an offence which is triable by criminal court and "criminal court" means a court of ordinary criminal jurisdiction in any part of India, whereas "court martial" means a court-martial held under the Act. "Offence" means any act or omission punishable under the Act and includes a civil offence.

Thus under the scheme of military law, offences can be categorized into four categories:-

(1) Offences which are not offence under the civil law but which for the first time have been created by the military law;

(2) Offences which are offences under the civil laws but which have also been included in the definitions of offences under the military law;

(3) Offences which are offence under the civil law but have been, by a legal fiction, made to be offence under the military law; and

(4) Offences which are offences under the civil law but have not been included amongst military law either by definition or fictionally.

The first category of offences is exclusively triable by a court-martial. The second and third categories of offences are triable both by a court-martial as

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* The original article received from District Hoshangabad has been substantially edited by the Institute

well as by ordinary criminal courts. The fourth category of offences is exclusively triable by ordinary criminal courts (See *Major Gopinathan v. State of M.P., AIR 1963 MP 249*)

Section 70 of the Army Act and Section 72 of the Air Force Act, relate to civil offences not triable by court-martial which provides that a person subject to the aforesaid Acts commits an offence of murder against a person not subject to military law or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences–

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf

"Active service" has been defined in all the three Acts. Such personnel would be deemed to be on active service even when they are on leave and when an accused on 'active service' in the military is charged with civil offence (e.g. rape) and is handed over to the police without being detained in military custody and the discretion under the concerned military law that the accused should be tried by court martial, is not exercised by concerned authority then the criminal court is competent to try him and compliance of Rule 4 of Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952 (now 1978) is not necessary. (See *Roshanlal v. State,1971 Cr.L.J. 554*)

Where an offence being a civil offence is deemed to be an offence against the military law then by force of Section 69 of the Army Act, Section 71 of Air Force Act, Section 77 of the Navy Act, 1967, it is triable both by an ordinary criminal court having jurisdiction to try the offence as well as by a court martial and that too in such situation, Sections 125 and 126 of the Army Act and Sections 124 and 125 of the Air Force Act are clearly intended to apply, which provide for choice between criminal court and court-martial which state that when a criminal court and a court-martial each have jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade, in which the accused person is serving, or such other officer as may be prescribed, to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody. Thus at the first instance, discretion is left with the concerned military authority.

But if a Criminal Court is of the opinion that the said offence shall be tried before itself, it may issue the requisite notice under Section 126 of the Act to the concerned Commanding Officer requiring him either to deliver over the offender to the nearest Magistrate or to postpone the proceeding pending a reference to the Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said court or refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government whose order in this regard shall be final.

But again what, if the proceedings have already been instituted in an ordinary criminal court having jurisdiction to try the matter? Such cases are governed by S. 475 Cr.P.C. (old S. 549 Cr.P.C.) which reads as under: –

> **Section 475.–** Delivery to Commanding Officers of persons liable to be tried by Court-martial – The Central Government may make rules consistent with this Code and the Army Act, 1980, the Navy Act, 1957 and the Air force Act, 1950 and any other law, relating to the Armed forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law or such other law, shall be tried by a Court to which this Code applies or by a Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court Martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial.
>
> *Explanation.*- In this section –
>
> (a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company,
>
> (b) "Court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.
>
> (2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his

utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial.

This Section and the Rules framed under it are to be read with Chapter XIII of the M.P. Rules & Orders (Criminal) relating to trial of persons subject to Military Naval or Air Force Law. Some of the important relevant Rules are as under:-

(I) **Rule 333** – Criminal cases against persons subject to military, naval or air force law shall not be tried by any magistrate who does not exercise the powers of a magistrate of the first class.

(II) **Rule 338** – The attention of the courts is invited to the provisions of section 549 (1) of the Code. The following rules have been made under that section:-

[Home Department Notification No. F- 102-35, dated the 12th March 1935, as subsequently amended]

(1) These rules may be called the Criminal Procedure (Military Offenders) Rules.

(2) Where a person subject to military, naval or air force law is brought before magistrate and charged with an offence for which he is liable under the Army Act, the Naval discipline Act, the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934, or the Air Force Act, to be tried by a court-martial, such magistrate, unless he is moved by the competent military, naval or air force authority to proceed against the accused under the Code of Criminal Procedure, 1898, shall before proceeding give notice to the commanding Officer of the accused, and until the expiry of a period of five days from the date of service of such notice, shall not –

(a) convict the accused under section 243, acquit him under section 247 of section 248, or hear him in his defence under section 244 of the said Code, or

(b) frame a charge against the accused under section 254 of the said Code, or

(c) make an order committing the accused for trial by the High Court or the Court of Session under section 213 or subsection (1) of section 446, of the said Code, or

(d) transfer the case for enquiry or trial under section 192 of the said Code, or

(e) issue an order under sub-section (1) of section 445 of the said Code for the case to be referred to a Bench.

[Government of India, Legal department. Notification No. F–248-44-C and G (Judicial), dated the 8th May 1945]

(3) Where within the period of five days mentioned in rule (2), or at any time thereafter before the magistrate has done any act or issued any order referred to in that rule, the Commanding Officer of the accused gives notice to the magistrate that, in the opinion of competent military, naval or air force authority as the case may be, the accused should be tried by a court-martial, the magistrate shall stay proceedings and, if the accused is in his power or under his control, shall deliver him, with the statement prescribed by section 549 of the said Code to the authority specified in the said section.

(4) Where a Magistrate has been moved by competent military, naval or air force authority, as the case may be, under rule (2), and the Commanding Officer of the accused subsequently gives notice to such magistrate that in the opinion of such authority, the accused should be tried by a court-martial, such magistrate, if he has not before receiving such notice done any act or issued any order referred to in rule (2), shall stay proceedings and, if the accused is in his power or under his control, shall in the like manner deliver him, with the statement prescribed in section 549 of the said code, to the authority specified in the said section.

(5) Where an accused person, having been delivered by the magistrate under rule (3) or (4), is not tried by a court-martial for the offence of which he is accused, or other effectual proceedings are not taken, or ordered

to be taken, against him, the magistrate shall report the circumstances to the Provincial Government.

(6) In these rules "competent military authority" means the Brigade Commander, "competent naval authority" means the Flag Officer Commanding, Royal Indian Navy, or the Flag Officer, Bombay, or the Commodore, Bay of Bengal and "competent air force authority" means the Air Officer Commanding, Indian Command, or any Group Commander, Air Command, South-East Asia of India Command.

[Government of India, Legal Department. Notification No. F–235-45-C and G (Judicial), dated the 20th June 1945]

(7) These rules extend to the whole of India, including Berar.

(III) **Rule 341** – The procedure in cases of civil offences committed by persons subject to the Indian Army Act is as given below:-

(a) All civil offences except those specified in the proviso to the Indian Army Act, section 41, can be tried either by court-martial or by a civil court.

(b) Offences under the Indian Army Act, Sections 27 (d), 35 (a) and (b), and 39 (b) and (d), as well as most offences under section 37 can also be tried by a court-martial or a civil court.

(c) The procedure to be followed in a case where there is dual jurisdiction is laid down in the Indian Army Act, sections 69 and 70, the prescribed military authority being the General Officer Commanding-in-Chief Command, or the District, Brigade or Station Commander.

If the offender is in military /civil custody, the Officer Commanding unit/ magistrate will take steps to request the prescribed military authority to decide the court before which proceeding shall be instituted, but in those cases falling under section 41 of the Indian Army Act, in which death has resulted, the decision shall rest with the District Commander or the General officer Commanding-in-Chief Command.

(IV) **Rule 346** – (1) A copy of the judgment or final order in all cases in which Commissioned Officers have been tried by civil courts for criminal offences should be supplied to the Secretary to the Government of India, Ministry of Defence (Army Branch), New Delhi.

(V) **Rule 347** – Copies of judgments, with a translation of vernacular judgments, shall be supplied free of charge on application by the head of the unit or department concerned.

The Central Government has made rules in exercise of the powers conferred on it u/S. 549 of old Cr.P.C. (now S.475 Cr.P.C.) and known as Criminal **Courts and Court-martial (Adjustment of jurisdiction) Rules 1952 (now 1978)** (hereinafter called as "the Rules")

The scheme of the Rules is that where a person subject to military, naval, air force or coast guard law or any other law relating to the armed forces of the Union is brought before a Magistrate and charged with the offence for which he is also liable to be tried by a Court-martial, he shall not proceed to try him unless he had been moved there to by the competent military authority **(Rule 3 of the Rules).** If he had not been so moved, he may proceed to try him:-

(a) If he is of opinion that he should do so after recording reasons therefor;

(b) After giving 15 days notice in writing to the commanding officer of the accused.

Until the expiry of period of 15 days from the date of service of the notice, the magistrate shall not convict or acquit him or hear him in his defence or frame in writing a charge, commit him for trial to the High Court or the court of sessions [See **Rule 4 of the Rules** and **Rule 338** of the **Rules and Orders (Criminal)**]

Though the compliance of notice under Rule 4 is mandatory but if military authority does not exercise its descretion under military law then criminal court can exercise its ordinary jurisdiction. (See *Major E.G. Barsay v. State of Bombay, AIR 1961 SC 1762*)

But before the Magistrate has done any of the acts or issued any of the orders mentioned in Rule 4 of the Rules, if the competent military, naval, air force or coast guard authority, as the case may be, gives notice to the Magistrate that in his opinion, the accused should be tried by a court-martial or coast guard Court, as the case may be, the Magistrate shall stay the proceedings and if the accused is in his power or under his control, shall deliver him together with statement referred to in S.475 Cr.P.C. to the competent military authority (**Rules 5 and 6 of the Rules**)

Under **Rule 7** of the Rules if on being delivered to the competent authority, the accused is not tried by a Court-martial or other effectual proceedings are

not taken against him, the Magistrate shall report the circumstances to the State Government, which may in consultation with the Central Government take appropriate steps to ensure that the accused is dealt with in accordance with law.

It is important to note that in case of civil offence by military personnel, if Magistrate takes cognizance and holds that there is a case for trying accused, military authority must proceed to hold Court-martial for their trial or take other effectual proceeding against accused as contemplated by law and the military authority is not entitled to ignore the proceedings taken by the Magistrate and it is also not open for them to hold a Court of enquiry and supersede the proceedings already taken by Magistrate. [See *Union of India v. Major S.K. Sharma, AIR 1987 SC 1878*]

Rule 8 of the Rules provides that notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, naval, air force, coast guard law, or any other law relating to the Armed forces of the Union for the time being in force has committed an offence, proceeding in respect of which ought to be instituted before him and that the presence of such person cannot be procured except through military, naval, air force or coast guard authorities, the Magistrate may by a written notice require the commanding officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law or to stay the proceedings against such person before the Court martial or coast guard Court, as the case may be if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted.

In *Ram Sarup v. Union of India and another, AIR 1965 SC 247,* the Constitutional Bench of the Apex Court while considering the scope of trial before the ordinary Criminal Court and Court-martial, has opined as under:

> "17. The procedure to be followed by a Court Martial is quite elaborate and generally follows the pattern of the procedure under the Code of Criminal Procedure. There are however material differences too. All the members of the Court-Martial are Military officers who are not expected to be trained Judges, as the presiding officers of Criminal Courts are. No judgment is recorded. No appeal is provided against the order of the Court-Martial. The authorities to whom the convicted person can represent against his conviction by a Court Martial are also non-judicial authorities. In the circumstances, a trial by an ordinary Criminal Court would be more beneficial to the accused than one by a Court-Martial. The question then is whether

the discretion of the officers concerned in deciding as to which Court should try a particular accused can be said to be an unguided discretion, as contended for the appellant. Section 125 (Army Act, 1950) itself does not contain anything which can be said to be a guide for the exercise of the discretion, but there is sufficient material in the Act which indicates the policy which is to be a guide for exercising the discretion and it is expected that the discretion is exercised in accordance with it. Magistrates can question it and the Government, in case of difference of opinion between the views of the Magistrate and the army authorities, decide the matter finally.

18. Section 69 provides for the punishment which can be imposed on a person tried for committing any civil offence at any place in or beyond India, if charged under S. 69 and convicted by a Court-Martial. Section 70 provides for certain persons who cannot be tried by Court-Martial, except in certain circumstances. Such persons are those who commit an offence of murder, culpable homicide not amounting to murder or of rape, against a person not subject to Military, Naval or Air Force law. They can be tried by Court-Martial of any of those three offences if the offence is committed while on active service or at any place outside India or at a frontier post specified by the Central Government by notification in that behalf. This much therefore is clear that persons committing other offences over which both the Court-Martial and ordinary Criminal Courts have jurisdiction can and must be tried by Courts-Martial if the offences are committed while the accused be on active service or at any place outside India or at a frontier post. This indication of the circumstances in which it would be better exercise of discretion to have a trial by Court-Martial, is an index as to what considerations should guide the decision of the officer concerned about the trial being by a Court-Martial or by an ordinary Court. Such considerations can be based on grounds of maintenance of discipline in the army, the persons against whom the offences are committed and the nature of the offences. It may be considered better for the purpose of discipline that offences which are not of a serious type be ordinarily tried by a Court-Martial, which is empowered under S. 69 to award a punishment provided

by the ordinary law and also such less punishment to be mentioned in the Act, Chapter VII mentions the various punishments which can be awarded by Court-Martial and S. 72 provides that subject to the provisions of the Act a Court-Martial may, on convicting a person of any of the offences specified in Ss. 34 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable or in lieu thereof any one of the punishments lower in the scale set out in S. 71, regard being had to the nature and degree of the offence.

19. The exigencies of service can also be a factor. Offences may be committed when the accused be in camp or his unit be on the march. It would lead to great inconvenience to the accused and witnesses of the incident, if all or some of them happen to belong to the army, should be left behind for the purpose of trial by the ordinary Criminal Court.

20. The trials in an ordinary Court are bound to take longer, on account of the procedure for trials and consequent appeals and revision, than trials by Court-Martial. The necessities of the service in the army require speedier trial. Sections 102 and 103 of the Act point to the desirability of the trial by Court-Martial to be conducted with as much speed as possible. Section 120 provides that subject to the provisions of sub-sec. (2), a summary Court-Martial may try any of the offences punishable under the Act and sub-section (2) states that an officer holding a summary Court-Martial shall not try certain offences without a reference to the officer empowered to convene a District Court-Martial or on active service a summary General Court-Martial for the trial of the alleged offender when there is no grave reason for immediate action and such a reference can be made without detriment to discipline. This further indicates that reasons for immediate action and detriment to discipline are factors in deciding the type of trial.

21. Such considerations, as mentioned above, appear to have led to the provisions of S. 124 which are that any person, subject to the Act, who commits any offence against, may be tried and punished for such offence in any place whatever. It is not necessary that he be tried at a place which be within

the jurisdiction of a Criminal Court having jurisdiction over the place where the offence be committed.

22. In short, it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court-Martial or by an ordinary Criminal Court, and therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.

23. Lastly, it may be mentioned that the decision of the relevant military officer does not decide the matter finally. Section 126 empowers a criminal court having jurisdiction to try an offender to require the relevant military officer to deliver the offender to the Magistrate to be proceeded against according to law or to postpone proceedings pending reference to the Central Government, if that Criminal Court be of opinion that proceedings be instituted before itself in respect of that offence. When such a request is made, the military officer has either to comply with it or to make a reference to the Central Government whose orders would be final with respect to the venue of the trial. The discretion exercised by the military officer is therefore subject to the control of the Central Government.

24. Reference may also be made to Section 549 of the Code of Criminal Procedure (old) which empowers the Central Government to make rules consistent with the Code and other Acts, including the Army Act, as to the cases in which persons subject to military, naval or air-force law be tried by a Court to which the Code applies or by Court-Martial. It also provides that when a person accused of such an offence which can be tried by an ordinary Criminal Court or by a Court-Martial is brought before a Magistrate, he shall have regard to such rules, and shall, in proper cases, deliver him, together with a statement of the offence of which he is accused, to the Commanding Officer of the regiment, corps, ship or detachment to which he belongs, or

to the Commanding Officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by Court-Martial. This gives discretion to the Magistrate, having regard to the rules framed, to deliver the accused to the military authorities for trial by Court-Martial.

25. The Central Government framed Rules ..... under S. 549 Cr.P.C. (old). ..... According to the rules ..... when a person charged is brought before a Magistrate on an accusation of offences which are liable to be tried by Court-Martial, the Magistrate is not to proceed with the case unless he is moved to do so by the relevant military authority. He can, however, proceed with the case when he be of opinion, for reasons to be recorded, that he should so proceed without being moved in that behalf by competent authority. Even in such a case he has to give notice of his opinion to the Commanding officer of the accused and is not to pass any order of conviction or acquittal under Ss. 243, 245, 247 or 248 of the Code of Criminal Procedure, or hear him in defence under S. 244 of the said Code; is not to frame any charge against the accused under S. 254 and it not to make an order of committal to the Court of Session or the High Court under Section 213 of the Code, till a period of 7 days expires from the service of notice on the military authorities. If the military authorities intimate to the Magistrate before his taking any of the aforesaid steps that in its opinion the accused be tried by Court-Martial, the magistrate is to stay proceedings and deliver the accused to the relevant authority with the relevant statement as prescribed in S. 549 of the Code. He is to do so also when he proceeds with the case on being moved by the military authority and subsequently it changes its mind and intimates him that in its view the accused should be tried by Court-Martial. The Magistrate, however, has still a sort of control over what the military authorities do with the accused. If no effectual proceedings are taken against the accused by the military authorities within a reasonable time, the Magistrate can report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law. All this is contained in Rr. 3 to 7. Rule 8 practically corresponds to S. 126 of the Act and

R. 9 provides for the military authorities to deliver the accused to the ordinary courts when in its opinion or under the orders of the Government, the proceedings against the accused are to be before a Magistrate.

26. According to S. 549 of the Code and the rules framed thereunder, the final choice about the forum of the trial of a person accused of a civil offence rests with the Central Government, whenever there be difference of opinion between a Criminal Court and the military authorities about the forum where an accused be tried for the particular offence committed by him. His position under Ss. 125 and 126 of the Act is also the same."

[See *also Major Gopinathan's case* (supra)]

In *Joginder Singh v. State of H.P., AIR 1971 SC 500,* the Apex Court has observed that in respect of an offence which could be tried both by a criminal court as well as a court-martial, Sections 125, 126 and the Rules, have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal courts and the court-martial. But discretion is left to the officer mentioned in Section 125 to decide before which court the proceedings should be instituted. It is only when the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a court-martial, that the Army Act would not obviously be in the way of a criminal court exercising its ordinary jurisdiction in the manner provided by law and Section 126 would not come into operation.

It has also been held by the Supreme Court that Rule 4 is related to clause (a) of Rule 3 and will be attracted only when the Magistrate proceeds to conduct the trial without having been moved by the competent military authority. When the competent military authorities, knowing full well the charge against the accused and the investigation that was being conducted by the police release him from military custody and hand him over to the civil authorities, the Magistrate is justified in proceeding on the basis that the military authorities had decided that the accused need not be tried by the court-martial and that he can be tried by the ordinary criminal Court.

The expression "is liable to be tried either by a Court to which this Court applies or by a Court martial" of Section 549 (1) of Cr.P.C. (5 of 1898) refers to initial jurisdiction to take cognizance i.e. to the stage at which proceedings are instituted in a court and not to the jurisdiction of the ordinary Criminal Court and the Court-martial to decide case on merits. (See *Delhi Special Police Establishment New Delhi v. Lt. Col. S.K. Loraiya, AIR 1972 SC 2548*)

In the case of *Captain P.K. Rekwal v. State of M.P., 2001 (1) MPHT 72,* the military authorities did not hand-over the petitioners for trial before the ordinary criminal court. They simply entrusted the investigation to the C.B.I. It was held by the M.P. High Court that after investigation the question is open before which court the petitioners should be tried. Merely because the investigation into the alleged offence was entrusted by the military officers to the C.B.I., the requirement of mandatory provisions of Sections 125 and 126 of the Army Act and Rules 3, 4 of the Rules does not come to an end.

Liability of offender who ceases to be subject of military law

According to Section 123 of Army Act, Section 122 of Air force Act and Section 80 of the Naval Act, when an offence under the aforesaid Acts has been committed by any person while subject to these Acts and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offences as if he continued to be so subject.

But the provision shall not affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court martial.

Successive trials by a Criminal Court and Court-Martial

Section 127 of the Army Act and Section 126 of the Air Force Act provide that a person convicted or acquitted by a court-martial may, with the previous sanction of the Central Government, be tried again by a Criminal Court for the same offence or on the same facts. In this context, the Apex Court in *Chief of Army Staff v. Major E.P. Chadha, AIR 1991 SC 460,* has observed that a perusal of the provisions of S. 127 of the Army Act clearly shows that there is no general bar as such prohibiting successive trial by a Court-martial and by a Criminal Court and that even where a person has been convicted or acquitted by a Court-martial of the offence in question, he can be tried for the same offence by a Criminal Court, with the previous sanction of the Central Government.

To conclude, the Army Act, Air Force Act or Navy Act does not expressly or impliedly bar jurisdiction of Criminal Court in respect of acts punishable both under the aforesaid Acts and other ordinary Criminal laws. In case an offence is triable both by an ordinary Criminal Court as well as by a Court-martial, the initial discretion lies with the officer Commanding the Army, Army corps etc. to decide before which Court the proceedings shall be instituted. However, if such officer decides that the proceedings should be instituted before a Court martial, and the Magistrate is of the view that the proceedings should be instituted before himself, he may require concerned military officer to deliver the offender to him or to postpone proceedings pending reference to the Central Government whose order would be final with respect to the venue of the trial.

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दण्ड प्रक्रिया संहिता की धारा 125 (1) के अंतर्गत पारित भरण पोषण राशि की वसूली के संबंध में धारा 125(3) द.प्र.सं. का विस्तार

न्यायाधीशगण
जिला पन्ना

दं.प्र.सं. की धारा 125 (3) में यह प्रावधान है कि यदि कोई व्यक्ति जिसके विरूद्ध धारा 125 (1) द.प्र.सं. के अंतर्गत भरण–पोषण हेतु आदेश दिया गया है, आदेश का अनुपालन करने में पर्याप्त कारण के बिना असफल रहता है तो मजिस्ट्रेट को यह अधिकार है कि उसके समक्ष संबंधित व्यक्ति द्वारा भरण–पोषण राशि की वसूली हेतु आवेदन प्रस्तुत किये जाने पर द.प्र.सं. की धारा 421 में प्रावधानित प्रक्रिया अनुसार व्यतिक्रमी की जंगम संपत्ति की कुर्की और विक्रय द्वारा भरण–पोषण की राशि उद्ग्रहित कराये अथवा व्यतिक्रमी की जंगम या स्थावर संपत्ति या दोनों से भूराजस्व के अवशेष के रूप में राशि उद्ग्रहित करने हेतु जिलाधीश को प्राधिकृत करते हुए वारंट जारी करे। उक्त वारंट के निष्पादन के पश्चात् प्रत्येक मास के न चुकाये गये पूरे भरण–पोषण या अंतरिम भरण–पोषण के भत्ते और कार्यवाहियों के खर्चे या उसके किसी भाग के लिये ऐसे व्यक्ति को एक मास तक की अवधि के लिये अथवा यदि वह उससे पूर्व चुका दिया जाता है तो चुका देने के समय तक के लिये कारावास का दंडादेश भी दिया जा सकता है।

परन्तु इस धारा के अधीन देय किसी भी रकम की वसूली के लिये कोई वारण्ट तब तक जारी नहीं किया जायेगा जब तक उस रकम को उद्ग्रहीत करने के लिये उस तारीख से जिसको वह देय हुई, एक वर्ष की अवधि के अंदर न्यायालय से आवेदन नहीं किया गया है।

परन्तु यदि ऐसा व्यक्ति इस शर्त पर भरण–पोषण करने की प्रस्थापना करता है कि उसकी पत्नी उसके साथ रहे और वह पति के साथ रहने से इंकार करती है तो ऐसा मजिस्ट्रेट उसके द्वारा कथित इंकार के किन्हीं आधारों पर विचार कर सकता है और ऐसी प्रस्थापना के किये जाने पर भी वह इस धारा के अधीन आदेश दे सकता है यदि उसका समाधान हो जाता है कि ऐसा आदेश देने के लिये न्याय संगत आधार है।

उक्त प्रावधान में स्पष्टीकरण के माध्यम से यह स्पष्ट किया गया है कि यदि पति ने अन्य स्त्री से विवाह कर लिया है या वह किसी अन्य महिला को रख लेता है तो वह उसकी पत्नी द्वारा उसके साथ रहने से इंकार करने का न्याय संगत आधार माना जायेगा।

इसके अतिरिक्त यदि अनावेदक प्रकट करता है कि आवेदिका (पत्नी) जारता की स्थिति में रह रही है या स्पष्टीकरण में दी गई दशा को छोड़कर बिना किसी पर्याप्त कारण अनावेदक (पति) के साथ रहने से इंकार कर रही है या परस्पर सहमति से पति–पत्नी पृथक रह रहे हैं तो ऐसा पर्याप्त कारण दर्शित करने पर न्यायालय वसूली की कार्यवाही के संबंध में विचार करते हुये विधि अनुसार आदेश इस संबंध में धारा 125 (5) द.प्र.सं. के तहत जारी कर सकता है।

यहां यह भी उल्लेखनीय है कि वसूली कार्यवाही न केवल उस मजिस्ट्रेट के द्वारा की जा सकती है जिसने भरण–पोषण संबंधी आदेश दिया है बल्कि द.प्र.सं. की धारा 128 के अनुसार ऐसे भरण–पोषण संबंधी किसी आदेश का प्रवर्तन ऐसे मजिस्ट्रेट द्वारा भी किया जा सकता है जिसका पक्षकारों की पहचान के बारे में तथा देय भत्तों और खर्चों आदि के न दिये जाने के बारे में समाधान हो गया हो और जिसके क्षेत्राधिकार में वह व्यक्ति हो जिसके विरूद्ध भरण–पोषण का आदेश दिया गया है। (इस संबंध में न्याय दृष्टांत *वल्लभदास रामचंद्र विरूद्ध अयोध्या बाई, 1987 एम.पी.एल.जे. 534* दृष्टव्य है)

इस प्रकार भरण–पोषण की राशि का भुगतान करने में व्यतिक्रम होने पर वसूली कार्यवाही में अनावेदक के विरूद्ध सबसे पहले यह प्रमाणित करना होगा कि वह बिना किसी पर्याप्त कारण के भुगतान करने में असफल रहा है। अनावेदक के विरूद्ध कार्यवाही करने से पूर्व उसकी संपत्ति का विवरण दिया जाना चाहिये ताकि यह स्पष्ट हो सके कि अनावेदक पर्याप्त साधन सम्पन्न है और उससे राशि वसूली जा सकती है।

मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टांत *दुर्गासिंह लोधी विरूद्ध प्रेमबाई, 1990 क्रिमिलन लॉ जनरल, 2065* में यह निर्धारित किया गया है कि मात्र दृश्य साधनों या जमीन–जायदाद के अभाव किसी व्यक्ति को भरण–पोषण धनराशि अदा करने के दायित्व से मुक्ति के पात्र नहीं बनाते हैं एवं समर्थ देह के स्वस्थ व्यक्ति को भरण–पोषण की राशि अदा करने के दायित्वाधीन रखा जाना चाहिये एवं इस प्रकार अर्जन की दृश्य क्षमता उपरांत भी भुगतान से बचने पर यह माना जाना चाहिये कि ऐसा व्यतिक्रम उसने बिना पर्याप्त कारण के किया है। वसूली वारंट जारी किये जाने पर भी यदि ऐसा व्यक्ति दायित्व का निर्वहन नहीं करता है तो उसे धारा 125 (3) द.प्र.सं. में विनिर्दिष्ट अवधि का कारावास दिया जा सकता है।

वसूली कार्यवाही में सामान्यतः सर्वप्रथम अनावेदक के विरूद्ध धारा 421 द.प्र.सं. में वर्णित प्रक्रिया अनुसार उसकी चल एवं अचल संपत्ति से राशि वसूली हेतु वारंट जारी किया जाना चाहिये तथापि आपवादिक दशाओं में प्रकरण की परिस्थितियों अनुसार अपेक्षित होने पर न्यायालय अनावेदक के विरूद्ध धारा 421 द.प्र.सं. के प्रावधानों के अंतर्गत वसूली वारंट जारी किये बिना अनावेदक के विरूद्ध सीधे कारावास का आदेश भी दे सकता है। इस संबंध में न्याय दृष्टांत *भूरे विरूद्ध गोमती बाई, 1981 क्रिमिलन लॉ जनरल, 789 एवं भोगीराम विरूद्ध श्रीमती भगवती बाई, 1989 (I) एम.पी. डब्ल्यू. एन. 287* अवलोकनीय है।

वसूली की कोई भी कार्यवाही उस तारीख से जिस तारीख को वह राशि देय हुई है, एक वर्ष की अवधि के अंदर न्यायालय में आवेदन प्रस्तुत करने पर ही प्रारंभ की जा सकती है। एक वर्ष की अवधि के बाद वसूली हेतु आवेदन पत्र प्रस्तुत किया जाता है तब धारा 125 (3) द.प्र.सं. के प्रथम परन्तुक में दी गई समय सीमा से बाधित होने के कारण वसूली की कार्यवाही के लिये कोई वारंट जारी नहीं किया जा सकता है। इस संबंध में न्याय दृष्टांत *लीला बाई विरूद्ध कैलाशचंद 2002 (4) एम.पी.एल.जे. 552 एवं सीमा विरूद्ध कमलेश कुमार शर्मा, 1999 (I) एम.पी.डब्यू.एन. 28* अवलोकनीय है। लेकिन यदि कोई वसूली कार्यवाही लंबित है और उसके पश्चात् पुनः राशि देय हो जाती है तो यह आवश्यक नहीं है कि प्रत्येक देय राशि के लिये हर बार पृथक से आवेदन पत्र प्रस्तुत किया जावे। उसी लंबित कार्यवाही में ऐसी आगामी अवशेष राशि की वसूली कार्यवाही की जा सकती है। इस संबंध में मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टांत *नन्ही बाई विरूद्ध नेतराम, 2001 क्रिमिनल ला जनरल 4325 = 2001 (4) एम.पी.एच.टी. 405 (खण्डपीठ), कंचन बाई विरूद्ध रवीन्द्र कुमार, 2001 (I) एम.पी.डब्लू.एन. 146 तथा अजब राव विरूद्ध रेखाबाई, 2005 (4) एम.पी.एल.जे. 579* अवलोकनीय है।

न्याय दृष्टांत *माया देवी विरूद्ध शंकर लाल, 2001 (1) एम.पी.एल.जे. 382* में यह प्रतिपादित किया गया है कि द.प्र.सं. की धारा 125 के तहत् अवयस्क के लिये भरण–पोषण का अधि–निर्णय दिये जाने की दशा में धारा 125 (3) द.प्र.सं. के प्रथम परन्तुक के तहत् उपबंधित एक साल की परिसीमा लागू नहीं होगी बल्कि परिसीमा अधिनियम की धारा 6 आकृष्ट होने से परिसीमा अवधि अवयस्क की विधिक निर्योग्यता समाप्त होने तक प्रारंभ नहीं होगी ।

प्रत्येक भंग के लिये राशि भुगतान न करने पर अधिकतम एक माह का कारावास का दंड दिया जा सकता है तथा एक वर्ष के अंदर ही उस वर्ष की वसूली की कार्यवाही की जा सकती है। इस प्रकार एक वर्ष में

बारह व्यतिक्रम होने पर प्रत्येक माह के भंग के लिये एक–एक माह के कारावास की सजा कुल बारह माह तक की कारावास की सजा उक्त कुल बारह भंग के लिये दी जा सकती है।

यहां यह उल्लेखनीय है कि मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टांत *शबनम विरूद्ध जमील खान, 2007 (2) एम.पी.एल.जे. 111* में यह मत व्यक्त किया गया है कि विगत बारह माह के भरण–पोषण की राशि की वसूली हेतु आवेदन पत्र प्रस्तुत होने पर उसे एक ही व्यतिक्रम माना जायेगा और व्यतिक्रमी को अधिकतम एक माह का ही कारावास दिया जा सकता है किन्तु इसके पूर्व नागपुर उच्च न्यायालय द्वारा न्याय दृष्टांत *किंग एम्परर विरूद्ध बुद्धो मण्डल गोंड, ए.आई.आर. (36) 1949 नागपुर 269* में यह निर्धारित किया जा चुका है कि एक माह से अधिक के भरण–पोषण की राशि अवशेष होने पर व्यतिक्रमी को एक माह से अधिक का कारावास दिया जा सकता है। नागपुर उच्च न्यायालय के उक्त न्याय दृष्टांत में प्रतिपादित विधि को मध्यप्रदेश उच्च न्यायालय द्वारा *शबनम विरूद्ध जमील खान* (उपरोक्त) में विचार में नहीं लिया गया है इस कारण पूर्व के प्रकरण *किंग एम्परर* (उपरोक्त) में प्रतिपादित विधि मान्य होगी कि एक माह से अधिक के भरण–पोषण की वसूली योग्य राशि अवशेष होने पर एक माह से अधिक का कारावास अधिरोपित किया जा सकता है । (देखिये *वली मोहम्मद विरूद्ध बातूल बाई, 2003 (2) एम.पी.एल.जे. 513* पूर्ण पीठ),

किंग एम्परर (उपरोक्त) में प्रतिपादित विधि का गुजरात उच्च न्यायालय की पूर्ण पीठ द्वारा सू *मोटो विरूद्ध गुजरात राज्य, 2009 क्रिमिलन लॉ जनरल 920* में अनुसरण किया गया है। इस संबंध में न्याय दृष्टांत *गोरक्षनाथ खांडू बगला विरूद्ध महाराष्ट्र राज्य, 2005 क्रिमिलन लॉ जनरल 3158 बाम्बे* (खंडपीठ) एवं *कोकल्या ब्रम्हनिया विरूद्ध कोकल्या पद्यमा, 1991 क्रिमिनल ला जनरल 07* भी दृष्टव्य है जिनमें क्रमशः बाम्बे उच्च न्यायालय एवं आंध्रप्रदेश उच्च न्यायालय द्वारा यह मत व्यक्त किया गया है कि एक वर्ष के भरण पोषण की अवशेष राशि की वसूली हेतु आवेदन पत्र प्रस्तुत होने पर व्यतिक्रमी को बारह व्यतिक्रम होने से अधिकतम बारह माह के कारावास की सजा दी जा सकती है।

व्यतिक्रम करने पर कारावास की सजा भुगत लिये जाने से अनावेदक भरण–पोषण की अवशेष राशि अदा करने के दायित्व से मुक्त नहीं हो जाता है क्योंकि कारावास दिया जाना वसूली का एक तरीका है न कि दायित्व से मुक्ति का। (इस संबंध में न्याय दृष्टांत *कुलदीप कौर विरूद्ध सुरिन्दर सिंह, ए.आई.आर.1989 सुको 232* अवलोकनीय है)। भरण पोषण की ऐसी अवशेष राशि की वसूली में कारावास भुगत लेने के उपरांत ऐसी राशि की वसूली अनावेदक की जंगम या स्थावर संपत्ति या दोनों की कुर्की और विक्रय के माध्यम से करने हेतु वसूली वारंट जारी करके ही की जा सकती है और व्यतिक्रम हेतु एक बार कारावास भुगत लेने के उपरांत समान व्यतिक्रम के लिये अनावेदक को पुनः कारावास नहीं दिया जा सकता है।

इस प्रकार धारा 125 (3) दं.प्र.सं. के प्रावधानों के तहत् भरण–पोषण की राशि देय होने के दिनांक से उसकी वसूली हेतु देय दिनांक से एक वर्ष की अवधि में वसूली हेतु कार्यवाही की जा सकती है। कार्यवाही के लिये सर्वप्रथम अर्थदण्ड की वसूली हेतु निर्धारित प्रक्रिया अपनाते हुए जंगम या स्थावर संपत्ति या दोनों की कुर्की और विक्रय द्वारा राशि उद्ग्रहित करने के लिये वारंट जारी करना चाहिये और तत्पश्चात् ही व्यतिक्रमी को प्रत्येक व्यतिक्रम के लिये एक माह तक के कारावास से भी दंडित किया जा सकता है। तथापि प्रकरण की समग्र परिस्थितियों को दृष्टिगत रखते हुए आवश्यक प्रतीत होने पर व्यतिक्रमी के विरूद्ध वसूली वारंट जारी किये बिना सीधे कारावास का आदेश भी दिया जा सकता है।

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विधिक समस्याएँ एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

एक आपराधिक प्रकरण में प्रतिभूति पर मुक्त रहते हुए कोई आरोपी यदि किसी अन्य प्रकरण में अभिरक्षा में रहता है तो क्या पहले प्रकरण में कारावास की दण्डाज्ञा होने पर उसे ऐसे अन्य प्रकरण में बिताई अभिरक्षा की अवधि के समायोजन (set off) की पात्रता होगी?

सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *महाराष्ट्र राज्य विरूद्ध नजाकत उर्फ मुबारक अली, ए.आई.आर.2001 सु.को. 2255* में यह विधि प्रतिपादित की गई है कि एक से अधिक प्रकरणों में किसी आरोपी के विचाराधीन बंदी (under trial prisoner) होने की दशा में उसे सिद्धदोष ठहराये जाने पर उसके द्वारा अभिरक्षा में व्यतीत अवधि धारा 428 द.प्र.सं. के अंतर्गत ऐसे प्रत्येक प्रकरण में उसे दी गई दण्डाज्ञा में से समायोजित की जायेगी।

किन्तु यदि किसी एक आपराधिक प्रकरण में कोई आरोपी प्रतिभूति पर मुक्त हो चुका हो और उसके पश्चात् किसी दूसरे प्रकरण में अभिरक्षा में निरूद्ध होता है और यदि पहले प्रकरण में ऐसे आरोपी के प्रतिभूति एवं बंध पत्र निरस्त/समपहृत नहीं किये गये हैं तथा आगामी विचारण हेतु ऐसे आरोपी को धारा 267 द.प्र.सं. के अंतर्गत कारागार से उपस्थिति के लिये आदेश (Production Warrant) से आहूत किया जाता है, तब ऐसा आरोपी इस पहले प्रकरण में विचाराधीन बंदी नहीं होगा एवं इस प्रकरण में यदि दोष सिद्धि पर उसे कारावास की दण्डाज्ञा दी जाती है, तब अन्य प्रकरण में विचाराधीन बंदी के रूप में बिताई गई कारावास की अवधि, उसकी उक्त कारावास की दण्डाज्ञा में से समायोजित नहीं की जाएगी।

यहाँ यह उल्लेखनीय है कि यदि पहले प्रकरण में प्रतिभूति का आदेश आरोपी के पक्ष में हो जाता है किन्तु अन्य प्रकरण में अभिरक्षा में होने से, या उसके द्वारा आदेशानुसार प्रतिभूति, बंधपत्र प्रस्तुत नहीं किये जाने से या अन्यथा किसी कारण से पहले प्रकरण में उसे प्रतिभूति पर मुक्त नहीं किया जाता है तब इस पहले प्रकरण में भी आरोपी विचाराधीन बंदी होगा और अन्य प्रकरणों में उसके द्वारा व्यतीत कारावास की अवधि इस पहले प्रकरण में उसे दोषसिद्धि पर दी गई दण्डाज्ञा में से समायोजित की जायेगी।

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परक्राम्य संलेख अधिनियम, 1881 की धारा 138 के अधीन चेक के अनादरण के ऐसे मामलों में, जिनमें अभियुक्त को चेक के अनादरण की लिखित सूचना 'प्राप्ति अभिस्वीकृति' सहित पंजीकृत डाक (Regd. A/D) से भेजी गई है तथा 'प्राप्ति अभिस्वीकृति' चेक के धारक को वापस प्राप्त नहीं हुई है, ऐसी सूचना किस दिन निर्वाह होना उपधारित की जाएगी अथवा किस दिन से धारा 138 (ग) के अधीन पंद्रह दिवस की अवधि की गणना प्रारंभ होगी?

प्रस्तुत बिंदु पर माननीय उच्चतम न्यायालय ने न्याय दृष्टांत *सुबोध विरूद्ध जयप्रकाश 2008 Cr.L.J. 3853 (सु.को.)* की कंडिका क्र. 21 (पृष्ठ 3957) में प्रेक्षित किया है कि तीस दिवस की अवधि सामान्य रूप से सूचना पत्र के निर्वाह हेतु पर्याप्त समझी जानी चाहिए। वस्तुतः जब सूचना पत्र का निर्वाह स्पीड पोस्ट द्वारा कराया जा रहा हो, वहां सामान्यतः ऐसा निर्वाह कुछ ही दिवस में सम्पन्न हो जाता है। सिविल प्रक्रिया संहिता, 1908 के आदेश 5 नियम 9 (5) के अधीन भी समन के तीस दिवस की अवधि में वापस नहीं आने की दशा में उसके निर्वाह की उपधारणा की जाती है। तद्नुरूप परिस्थिति में न्यायालय के लिए यह अवधारित न करने का कोई कारण नहीं होना चाहिए कि सूचना पत्र का निर्वाह तीस दिवस की अवधि में सम्पादित नहीं किया जा सकता है।

संविधि के अधीन निर्वाह की उपधारणा सामान्य खण्ड अधिनियम की धारा 27 के अंतर्गत न केवल इसे पंजीकृत डाक से भेजे जाने पर उत्पन्न होती है वरन् ऐसी ही उपधारणा साक्ष्य अधिनियम की धारा 114 के अंतर्गत भी उत्पन्न हो सकती है।

इस प्रकार पंजीकृत डाक से प्रेषित सूचना पत्र की यदि अभिस्वीकृति (A/D) प्राप्त नहीं होती है तो सूचना पत्र का निर्वाह उसे प्रेषित किए जाने के दिवस से तीस दिवस की अवधि पर्यन्त उपधारित किया जाएगा और तद्नुसार परक्राम्य लिखत अधिनियम की धारा 138 (ग) के अधीन पन्द्रह दिवस की अवधि की गणना भी ऐसे सूचना पत्र के निर्वाह के दिवस से तीस दिवस की अवधि की समाप्ति के दिवस से होगी।

नोट : स्तंभ **"समस्या एवं समाधान"** के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे – **संचालक**

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PART - II

NOTES ON IMPORTANT JUDGMENTS

386. ARBITRATION & CONCILIATION ACT, 1996 – Sections 2 (1) (a) & (d), 7, 12, 18 and 34 (2)

A person being an employee of one of the parties (which is a State or its instrumentality) cannot *per se* be a bar to his acting as an Arbitrator nor his appointment as such shall *ipso facto* be a ground to raise a presumption of bias or partiality or lack of independence on his part – Scope and legal position of such an arbitration agreement explained.

Indian Oil Corporation Limited and others v. Raja Transport Private Limited

Judgment dated 24.08.2009 passed by the Supreme Court in Civil Appeal No. 5760 of 2009, reported in (2009) 8 SCC 520

Held:

Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the Arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a government/statutory corporation/public sector undertaking containing an arbitration agreement providing that one of its Secretaries/Directors shall be the arbitrator, he can not subsequently turn around and contend that he is agreeable for settlement of disputes by arbitration, but not by the named arbitrator who is an employee of the other party.

No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named Arbitrator contained in the arbitration clause.

It is now well settled by a series of decisions of this Court that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the Arbitrator, are neither void nor unenforceable.

[See also *Executive Engineer v. Gangaram Chhapolia, (1984) 3 SCC 627, Eckersley v. Mersey Docks and Harbour Board, (1891-94) AII.EReb 1130 (CA) International Airports Authority of India v. K.D. Bali, (1988) 2 SCC 360, Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd., (1996) 1 SCC 54, Union of India v. M.P. Gupta, (2004) 10 SCC 504* and *Ace Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd., (2007) 5 SCC 304*]

The fact that the named arbitrator is an employee of one of the parties is not *ipso facto* a ground to raise a presumption of bias or partiality of lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute.

Where however the named arbitrator though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually heads of department or equivalent) of a government/statutory corporation/ public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.

The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the state and its instrumentalities. For example, if the Director of a private company (which is a party to the Arbitration agreement), is named as the arbitrator, there may be valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person.

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387. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 7 (5) & 11
Whether the provision for arbitration contained in the contract between the principal employer and the contractor, was incorporated by reference in the sub-contract between the contractor and the sub-contractor? Held, mere reference of the contract between the principal employer and contractor in the subsequent contract between contractor and sub-contractor is not sufficient – Conditions for incorporation of arbitration clause from another document (main contract) in the contract (sub-contract), laid down in detail.

M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited

Judgment dated 07.07.2009 passed by the Supreme Court in Civil Appeal No. 4150 of 2009, reported in (2009) 7 SCC 696

Held:

PWD, Government of Kerala entrusted to the respondent a certain work on certain portions of a national highway including construction of project directorate building. The contract between PWD and the respondent contained an arbitration clause stating that any dispute in respect of which : (a) the decision, if any, of the Engineer had not become final and binding in terms of the contract, and (b) amicable settlement had not been reached within the period specified, should be referred to a committee of three arbitrators. One of the arbitrators was to be employed by the employer, another, by the contractor and the third one by the Director General (Road Development), Ministry of Surface Transport (Roads Wing), Government of India. The word "Engineer" referred to person appointed by the State of Kerala to act as Engineer for the purpose of the said contract.

The respondent engaged the appellant as a sub-contractor for the latter part of the work, namely, "construction of project directorate building" under its work order. Stating, inter alia, the per square metre price of construction, the work order added: "This sub-contract shall be carried out on the terms and conditions as applicable to main contract unless otherwise mentioned in this order letter." The appellant claimed from the respondent, in terms of the work order, certain amounts for certain extra items executed and excess quantities of items used on the instructions of PWD.

As neither was the claim settled nor did the respondent agree to refer the dispute to arbitration, the appellant filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 (the Act). Relying upon the term in the sub-contract that the "sub-contract shall be .... main contract", the appellant contended that the entire contract between the Department and the respondent, including the arbitration clause had become a part and parcel of the contract between the parties. The appellant further contended that having regard to Section 7 (5) of the Act, the arbitration clause contained in the main contract constituted an arbitration agreement between the respondent and the appellant on account of incorporation thereof by reference in the sub-contract. The designate of the Chief Justice rejected the said application. The appellant then filed the present appeal by special leave.

The scope and intent of Section 7 (5) of the Act may be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract.

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where a contract provides that the standard form of terms and conditions of an independent trade or profession institution (as for example the standard terms and conditions of trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.

The work order (sub-contract) in the present case shows that the intention of the parties was not to incorporate the main contract in entirely into the

sub-contract. The use of the words "this sub-contract shall be carried out on the terms and conditions as applicable to the main contract" in the work order would indicate an intention that only the terms and conditions in the main contract relating to execution of the work, were adopted as a part of the sub-contract between the respondent and the appellant, and not the parts of the main contract which did not relate to execution of the work, as for example the terms relating to payment of security deposit, mobilization advance, the itemized rates for work done, payment, penalties for breach, etc., or the provision for dispute resolution by arbitration.

An arbitration clause though an integral part of the contract, is an agreement within an agreement. It is a collateral term of a contract, independent of and distinct from its substantive terms. It is not a term relating to "carrying out" of the contract. In the absence of a clear or specific indication that the main contract in entirety including the arbitration agreement was intended to be made applicable to the sub-contract between the parties, and as the wording of the sub-contract discloses only an intention to incorporate by reference the terms of the main contract relating to execution of the work as contrasted from the dispute resolution, it is held that the arbitration clause in the main contract did not form part of the sub-contract between parties.

Even assuming that the arbitration clause from the main contract had been incorporated into the sub-contract by reference, it has to be held that the appellant could not have claimed the benefit of the arbitration clause. This is in view of the principle that when the document to which a general reference is made, contains an arbitration clause whose provisions are clearly inapt or inapplicable with reference to the contract between the parties, it would be assumed or inferred that there was no intention to incorporate the arbitration clause from the referred document.

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388. ARMS ACT, 1959 – Section 27
PROBATION OF OFFENDERS ACT, 1958

(i) Use of licensed weapon for unlawful purpose is punishable under Section 27 of the Arms Act (as per amended provision) – If the offence has been committed prior to amendment of Section 27 of the Act, case has to be examined under the unamended provisions of the Act – Position explained.

(ii) Relief under the Probation of Offenders Act – Should be granted where the offence had not been of a very grave nature and in certain cases where *mens rea* remains absent – Case of *Manjappa v. State of Karnataka, (2007) 6 SCC 231* followed.

Karamjit Singh v. State of Punjab

Judgment dated 06.07.2009 passed by the Supreme Court in Criminal Appeal No. 958 of 2004, reported in (2009) 7 SCC 178

Held:

In Criminal Appeal No. 959 of 2004 under the Arms Act, learned Senior Counsel for the appellant has submitted that in view of the provisions of Section 27 of the said Act, conviction of the appellant was totally unwarranted. Learned Standing Counsel for the State has opposed the contention submitting that there has been amendment in the said provisions immediately after the date of occurrence of offence in the instant case. The case is to be decided taking into consideration the unamended provisions. Section 27 at the relevant time i.e. on the date of incident read as under:

> "27. Punishment for possessing arms, etc. with intent to use them for unlawful propose. – Whoever has in his possession any arms or ammunition with intent to use the same for any unlawful purpose or to enable any other person to use the same for any unlawful purpose shall, whether such unlawful purpose has been carried into effect or not, be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both."

The said provision simply provided that a person even if was in possession of a licensed gun or a weapon and used it for "unlawful purpose", he would be liable to punishment.

The said provision of Section 27 stood amended subsequent to the date of incident. Therefore, the case is to be examined under the unamended provisions of the Act. Thus, the contentions raised by learned Senior Counsel for the appellant in this respect are not worth consideration. In this view of the matter, Criminal Appeal No. 959 of 2004 is also liable to be dismissed.

At this juncture, learned Senior Counsel for the appellant has submitted that as it was the first offence of the appellant and he has served part of the sentence and a long period has elapsed since the date of occurrence of the incident, it is desirable that the appellant may be granted benefit of the provisions of the Probation of Offenders Act, 1958 or Section 360 and 361 of the Criminal Procedure Code, 1973 (CrPC). On the contrary, learned counsel for the respondent has opposed the reliefs sought by learned Senior Counsel for the appellant.

In *Manjappa v. State of Karnataka, (2007) 6 SCC 231,* this Court considered the scope of grant of relief under the provisions of Section 361 CrPC or under the provisions of the Probation of Offenders Act, 1958 reconsidering earlier judgment of this Court in *Om Prakash v. State of Haryana, (2001) 10 SCC 477* and held that such a relief should be granted where the offence had not been of a very grave nature and in certain cases where mens rea remains absent.

In the instant case, the High Court reduced the sentence from three years to one year and as the instant case is of a very grave naturte as there has been a large number of injuries, we are not inclined to grant leave sought by the appellant.

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*389. **CIVIL PROCEDURE CODE, 1908 – Sections 10 & 11**
ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a), (c) & (n) and 2 (b)
Plaintiff had filed a suit for declaration in respect of the suit property – In WS, the defendant denied the title of the plaintiff – Therefore, the plaintiff filed another suit u/s 12(1) (a), (c) and (n) of the M.P. Accommodation Control Act for ejectment of the defendant – In the suit, the defendant again denied the title of the plaintiff – The defendant, thereafter filed an application u/s 10 CPC for staying the subsequent suit for ejectment contending that in both the suits substantial issue is common regarding the fact of ownership of the suit property – Held, S. 10 of the Code would apply if there is identity of the matter in issue in both the suits – In a suit for ejectment which is not filed u/s 12 (1) (e) and (f) of the Act, the question of title is not directly and substantially in issue but is incidental and collateral – Therefore, Section 10 of CPC will not be attracted.

Rajesh Singh and others v. Manoj Kumar

Judgment dated 21.8.2009 passed by the High Court in Writ Petition No. 2751 of 2009, reported in 2009 (4) MPHT 373 (DB)

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390. **CIVIL PROCEDURE CODE, 1908 – Section 151**
Consolidation of suits, object and permissibility of – Inherent power of Court u/s 151 of the Code, exercise of – Consolidation of suits though not specifically provided in Code of Civil Procedure, may be directed in order to avoid firstly, conflicting judgments and secondly, to save valuable time, energy and money by clubbing the cases involving common question together – Consolidation of suits in appropriate cases may be ordered by invoking Section 151 of the Code – Court has undoubtedly such a power where the circumstance so required to exercise inherent power to act *ex debito justitio* and to do real and substantial justice for the administration, for which alone, it exists – Section 151 of the Code does not confer any power but only indicates that there is power inherent in the Court to make such orders as may be necessary for achieving the ends of justice as well as to prevent an abuse of the process of the Court.

Parwati Bai v. Kriparam and others

Judgment dated 07.08.2009 passed by the High Court in Writ Petition No. 2101 of 2009, reported in 2009 (4) MPLJ 144 (D.B.)

Held:

Consolidation of suits is not specifically provided in Code of Civil Procedure as applicable to the State of Madhya Pradesh. It seems that it is only State of Uttar Pradesh, which has made a specific provision for consolidation of cases

by inserting Order 4-A in Code of Civil Procedure by way of amendment (U.P. Act of 57 of 1976) which runs as follows:

> **1. Consolidation of suits and proceedings:** – When two or more suits or proceedings are pending in the same court and the court is of opinion that it is expedient in the interest of justice, it may by order direct their joint trial, whereupon all such suits and proceedings may be decided upon the evidence in all or any such suits or proceedings [U.P. Act 57 of 1976, Section 5 (1-1-1977)]

Code of Civil Procedure as it applies to the State of Madhya Pradesh contains no specific provision for consolidation of suits. It may be achieved by invoking Section 151 of Civil Procedure Code. Code of Civil Procedure is not exhaustive for the simple reason that legislature is not capable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing a procedure for them. Supreme Court of India in the case of *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527* has observed:

The Code of Civil Procedure is undoubtedly not exhaustive: it does not lay down rules for guidance in respect of all situations nor does it seek to provide rules for decision of all conceivable cases which may arise. The Civil Courts are authorized to pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court, but where an express provision is made to meet a particular situation the Code must be observed, and departure therefrom is not permissible.

As regards scope of Section 151, Civil Procedure Code, it has been observed in the aforesaid case:

Section 151, Civil Procedure Code itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the fact of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the court, it is a power inherent in the Court by virtue of its duty to do justice between the parties before it.

In view of the aforesaid, by no stretch of imagination it can be doubted that consolidation of suits in appropriate cases may be ordered by invoking Section 151 of Civil Procedure Code. Court has undoubtedly such a power where the circumstance so required to exercise inherent power to act *ex debito* justitios and to do real and substantial justice for the administration, for which alone it exists. Thus, section 151, Civil Procedure Code does not confer any power but only indicates that there is power inherent in the Court to make such orders as may be necessary for achieving the ends of justice as well as to prevent an abuse of the process of the Court.

Consolidation of suits though not specifically provided in Code of Civil Procedure, may be directed to avoid firstly; conflicting judgments and secondly; to save, valuable time, energy and money by clubbing the cases involving common question together.

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***391. CIVIL PROCEDURE CODE, 1908 – Order 9 Rules 8 & 9**

Bar to fresh suit under Order 9 Rule 9 of the Code, applicability of – Plaintiff filed a suit for declaration of title and perpetual injunction in respect of agricultural land pleading that though he is the owner of the suit land, defendants got their names recorded in the revenue record and his application for recording his name has been rejected by the Tehsildar on the ground that he may get his title declared from the Civil Court – The suit was dismissed in default of appearance – The plaintiff filed a subsequent suit again for declaration of title with respect to the same land on the basis of the same set of facts and also prayed that the sale deed executed during the pendency of the proceedings by defendant Nos. 1 to 3 in favour of defendant No. 4 be declared as null and void – Defendant No. 4 filed an application under Order 7 Rule 11 CPC to the effect that the subsequent suit is barred under Order 9 Rule 9 CPC – The trial Court accepting the application, rejected the plaint under Order 7 Rule 11 (d) of CPC holding that the subsequent suit is barred under Order 9 Rule 9 of the Code as the earlier suit was dismissed after appearance of the defendant in default of appearance under Order 9 Rule 8 of the Code – Held, the trial Court rightly held that the plaintiff was precluded from filing subsequent suit on the basis of same cause of action.

Karuna Chaturvedi (Smt.) and others v. Sarojini Agarwal (Smt.) and others

Judgment dated 16.07.2009 passed by the High Court in First Appeal No. 563 of 2004, reported in 2009 (4) MPHT 442 (DB)

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392. CIVIL PROCEDURE CODE, 1908 – Order 13 Rule 10

Calling of documents from other courts – If the document is essential for proving the case by a party, ordinarily the same should not be refused – Application made for calling the record from criminal Court for decision in Civil Court should be allowed – Care should be taken that such direction would not interfere in the progress of the criminal case.

Lakshmi & Anr. v. Chinnammal @ Rayyammal & Ors.

Judgment dated 08.04.2009 passed by the Supreme Court in Civil Appeal No. 2243 of 2009, reported in AIR 2009 SC 2352

Held:

If bringing on record a document is essential for proving the case by a party, ordinarily the same should not be refused; the Court's duty being to find out the truth. The procedural mechanics necessary to arrive at a just decision must be encouraged. We are not unmindful of the fact that the court in the said process would not encourage any fishing enquiry. It would also not assist a party in procuring a document which he should have himself filed.

There cannot furthermore be any doubt that by calling for such documents, the Court shall not bring about a situation whereby a criminal proceeding would remain stayed as it is a well settled principle of law that where a Civil proceeding as also a Criminal proceeding is pending, the latter shall get primacy.

In *Anil Behari Ghosh v. Smt. Latika Bala Dessi & Ors., AIR 1955 SC 566,* it is stated :

> "The learned counsel for the contesting respondent suggested that it had not been found by the lower appellate court as a fact upon the evidence adduced in this case, that Girish was the nearest agnate of the testator or that Charu had murdered his adoptive father, though these matters had been assumed as facts. The courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is a valid and genuine will, there is intestacy in respect of the interest created in favour of Charu if he was the murderer of the testator. On this question the courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Charu to transportation for life, it is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence."

In *Shanti Kumar Panda v. Shakuntala Devi, (2004) 1 SCC 438,* this Court held :

> "(3) A decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court. An order passed by the Executive Magistrate in proceedings under Sections 145/146 of the Code is an order by a criminal court and that too based on a summary enquiry. The order is entitled to respect and wait before the competent court at the interlocutory stage. At the stage of final adjudication of rights, which would be on the evidence

adduced before the court, the order of the Magistrate is only one out of several pieces of evidence."

In a Civil Suit, a document has to be proved. The report of an expert is also required to be brought on record in terms of the provisions of the Indian Evidence Act. Having regard to the provisions contained in Order XIII, Rule 8 of the Code, the Civil Court would furthermore be entitled to substitute the original document by a certified copy. We, therefore, fail to appreciate as to why the said original document could not be called for.

In view of the aforementioned pronouncements, we are of the opinion that the learned Trial Judge should have acceded to the prayer of the appellants herein.

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393. CIVIL PROCEDURE CODE, 1908 – Order 22 Rules 4 (4) & 10-A
Necessity of substituting L.Rs. of the non-contesting defendant – Exemption therefrom under Order 22 Rule 4 (4) must be obtained before pronouncement of judgment – Failure to intimate the knowledge of the death of the defendant to the Court as well as to the plaintiff is not a valid ground to grant exemption after passing judgment – Position explained.

T. Gnanavel v. T.S. Kanagaraj & Anr.

Judgment dated 25.02.2009 passed by the Supreme Court in Civil Appeal No. 1259 of 2009, reported in AIR 2009 SC 2367

Held:

The question that needs to be decided in this appeal relates to the interpretation of Order XXII, Rule 4 (4) of the Code of Civil Procedure (for short 'the CPC').

The interpretation given by the High Court in the impugned judgment is that once the sole defendant dies and the civil court passes a decree in ignorance of the same and thereafter even there being any exemption obtained under Order XXII, Rule 4 sub-rule (4) of the CPC to bring the heirs and legal representatives of the sole defendant on record, the ex parte decree passed in favour of the plaintiff/appellant becomes a nullity.

However, this is subject to Order XXII, Rule 4(4) of the CPC which runs as under: -

> "*Order 22, Rule 4(4)* – The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and

shall have the same force and effect as if it has been pronounced before the death took place."

A plain reading of Order XXII Rule 4 (4) of the CPC would clearly show that the Court is empowered to exempt a plaintiff from the necessity of substituting the heirs and legal representatives of any such defendant who has failed to file a written statement or who, having filed it, had failed to appear and contest the suit at the time of hearing of the same, but such an exemption can only be granted before the judgment is pronounced and in that case only, it can be taken against the said defendant notwithstanding the death of such defendant and such a decree shall have the same force and effect as it was pronounced before the death had taken place. Learned senior counsel appearing on behalf of the appellant relying on a decision of this Court in the case of *Zahirul Islam v. Mohd. Usman and Others, 2003 (1) SCC 476,* argued that since an application from exempting the plaintiff/appellant from bringing on record the heirs and legal representatives of the defendant was filed in the present case but in view of the fact that exemption under Order XXII Rule 4 (4) was not allowed in the above mentioned decision and in the aforesaid decision, no such permission was sought or granted by the Court, the High Court was in error in holding that the decree passed in the suit for specific performance of the contract by the trial court was a nullity. We are unable to accede to this submission of the learned senior counsel appearing on behalf of the appellant for the simple reasons viz. (1) on the abatement caused on the death of defendant, the suit automatically abated in view of the provisions under Order XXII Rule 4(3) of the CPC and (2) from the decision in the case of *Zahirul Islam* (supra), it would be evident that no exemption was sought or granted under Order XXII Rule 4(4) of the CPC in the aforesaid decision. In any view of the matter, Order XXII Rule 4(4) of the CPC clearly says that such exemption to bring on record the heirs and legal representatives of the deceased could be taken or granted by the court only before the judgment is pronounced and not after it.

In view of our discussions made hereinabove and after going through the provisions under Order XXII Rule 4(4) of the CPC, as discussed herein earlier, and in view of the principles laid down by the aforesaid decision, it is, therefore, clear that if exemption, which is provided under Order XXII Rule 4(4) of the CPC is obtained from the Court before the delivery of the judgment, in that case, it would be open to the Court to exempt the plaintiff from bringing on record the heirs and legal representatives of the defendant even if, the defendant had died during the pendency of the suit as if the judgment was pronounced by treating that the defendant was alive notwithstanding the death of such defendant and shall have the same force and effect as if it was pronounced before the death had taken place. That being the position, we are, therefore, of the view that since in this case, admittedly, exemption was obtained after the judgment was pronounced, the provision of Order XXII Rule 4(4) of the CPC would not be attracted.

In our view, the aforesaid decision in the case of *Zahirul Islam* (supra) can also be distinguished on facts. As noted herein earlier, in that decision, the plaintiff did not seek permission of the Court under Order XXII Rule 4(4) of the CPC and in that view of the matter, this Court held that the legal representatives of the deceased defendant was entitled to be brought on record in the suit. Admittedly, in our case, after the judgment was pronounced, the permission was sought to exempt the plaintiff from the necessity of substituting the heirs and legal representatives of the defendant and not before it.

For the reasons aforesaid, we are of the opinion that the High Court had rightly interpreted the provision of Order XXII Rule 4(4) of the CPC and accordingly held that the decree passed by the trial court on 20th of December, 2002, in O.S. No. 3946 of 1999 was a nullity in the eye of law as the defendant had died during the pendency of the suit for specific performance of the contract for sale and no exemption was sought at the instance of the plaintiff/appellant to bring on record the heirs and legal representatives of the defendant before the judgment was pronounced.

There is another submission that needs to be considered at this stage. The learned counsel appearing on behalf of the appellant had contended that the respondents were duty bound under the provisions of Order XXII Rule 10 (A) of the CPC to intimate the knowledge of the death of the defendant to the court as well as to the appellant, which they had failed to do and therefore, the trial court was correct in law to grant exemption to the appellant from bringing on record the heirs and legal representatives of the defendant after the decree was passed. As had already been mentioned above, the conditions laid down in the above mentioned rule are clear to the effect that the exemption to be granted by the court has to be obtained before the judgment is delivered and not after it. Therefore, we are not in a position to accept the contention of the appellant to this effect.

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***394. CIVIL PROCEDURE CODE, 1908 – Order 41 Rules 23, 23-A, 25, 27 & 28**

Power of remand vests in the Appellate Court either in terms of Order 41 Rules 23 and 23-A or Order 41 Rule 25 of CPC but when an application for adducing additional evidence is allowed, the Appellate Court has only two options – It may record the evidence itself or it may direct the Trial Court to do so – It could not direct Trial Court to dispose of the suit after taking evidence.

H.P. Vedavyasachar v. Shivashankara and another

Judgment dated 03.08.2009 passed by the Supreme Court in Civil Appeal No. 5201 of 2009, reported in (2009) 8 SCC 231

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395. CONSTITUTION OF INDIA – Articles 19 (1) (a), 227 & 235
ADVOCATES ACT, 1961 – Sections 9, 24, 34 & 35
CONTEMPT OF COURTS ACT, 1971 – Sections 2 (c) (ii) & (iii), 3 (3) read with proviso (ii) Explanation B
BMW Hit and run case:

(i) General guidelines issued for assuming more proactive role by the High Court for monitoring and protection of criminal trials in addition to High Courts powers of superintendence over subordinate judiciary for effective criminal justice system – Superintendence should not be confined only to posting, transfer and promotion of the officers of the subordinate judiciary but power to control over should also be exercised to protect them from external interference that may sometimes appear overpowering to them and to support them to discharge their duties fearlessly – Scope and extent of role of High Courts towards superintendence of subordinate judiciary enlarged.

(ii) Role and responsibilities of Bar Council of India and other Bar Councils of the different States in respect of declining standards of professional conduct of lawyers particularly professional standards and ethics reiterated to ensure the restoration of the high professional standards amongst lawyers worthy of their profession in the judicial system and in the society.

(iii) Media trial – What is? Explained – Limitations of freedom of broadcasting a *sub judice* matter and right of telecast of sting operation concerning a pending criminal trial to some extent even without the prior permission of the Court concerned or its respective High Court – Held, proper, subject to Section 3 (3) read with proviso (ii) Explanation B of the Contempt of Courts Act, 1971 and of course the programme shown should be substantially true, accurate and intended to prevent attempt to interfere or obstruct the due course of the concerned criminal trial.

R.K. Anand v. Registrar, Delhi High Court

Judgment dated 29.07.2009 passed by the Supreme Court in Criminal Appeal No. 1393 of 2008, reported in (2009) 8 SCC 106

Held:

Before laying down the records of the case we must also advert to another issue of great importance that causes grave concern to this Court. At the root of this odious affair is the way the BMW trial was allowed to be constantly interfered with till it almost became directionless.

We have noted Kulkarni's conduct (prime witnees) in course of investigation and at the commencement of the trial; the fight that broke out the court premises between some policemen and a section of lawyers over his control and custody; the manner in which Hari Shankar Yadav, a key prosecution witness turned hostile

in court; the curious way in which Manoj Malik, another key witness for the prosecution appeared before the court and overriding the prosecution's protest, was allowed to depose only to resile from his earlier statement. All this and several other similar developments calculated to derail the trial would not have escaped the notice of the Chief Justice or the Judges of the Court. But there is nothing to show that the High Court, as an institution, as a body took any step to thwart the nefarious activities aimed at undermining the trial and to ensure that it proceeded on the proper course. As a result, everyone seemed to feel free to try to subvert the trial in any way they pleased.

We must add here that this indifferent and passive attitude is not confined to the BMW trial or to the Delhi High Court alone. It is shared in greater or lesser degrees by many other High Courts. From experience in Bihar, the author of these lines can say that every now and then one would come across reports of investigation deliberately botched up or of the trial being hijacked by some powerful and influential accused, either by buying over or intimidating witnesses or by creating insurmountable impediments for the trial court and not allowing the trial to proceed. But unfortunately the reports would seldom, if ever, be taken note of by the collective consciousness of the Court. The High Court would continue to carry on its business as if everything under it was proceeding normally and smoothly. The trial would fail because it was not protected from external interferences.

Every trial that fails due to external interference is a tragedy for the victim(s) of the crime. More importantly, every frustrated trial defies and mocks the society based on the rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognizable and it then loses the trust and confidence of the people.

Every failed trial is also, in a manner of speaking, a negative comment on the State's High Court that is entrusted with the responsibility of superintendence, supervision and control of the lower courts. It is, therefore, high time for the High Courts to assume a more proactive role in such matters. A step in time by the High Court can save a criminal case from going astray. An enquiry from the High Court Registry to the quarters concerned would send the massage that the High Court is watching; it means business and it will not tolerate any nonsense. Even this much would help a great deal in insulating a criminal case from outside interferences. In very few cases where more positive intervention is called for, if the matter is at the stage of investigation the High Court may call for status report and progress reports from police headquarter or the Superintendent of Police concerned. That alone would provide sufficient stimulation and pressure for a fair investigation of the case.

In rare cases if the High Court is not satisfied by the status/progress reports it may even consider taking up the matter on the judicial side. Once the case reaches the stage of *trial* the High Court obviously has far wider powers. It can assign the trial to some judicial officer who has made a reputation for

independence and integrity. It may fix the venue of the trial at a proper place where the scope for any external interference may be eliminated or minimized. It can give effective directions for protection of witnesses and victims and their families. It can ensure a speedy conclusion of the trial by directing the trial court to take up the matter on a day-to-day basis.

The High Court has got ample powers for all this both on the judicial and administrative sides. Article 227 of the Constitution of India that gives the High Court the authority of superintendence over the subordinate courts has great dynamism and now is the time to add to it another dimension for monitoring and protection of criminal trials. Similarly, Article 235 of the Constitution that vests the High Court with the power of control over subordinate courts should also include a positive element. It should not be confined only to posting, transfer and promotion of the officers of the subordinate judiciary. The power of control should also be exercised to protect them from external interference that may sometimes appear overpowering to them and to support them to discharge their duties fearlessly.

The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as Special Public Prosecutor), both of them lawyers of long standing, and designated Senior Advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct.

We have viewed with disbelief Senior Advocates freely taking part in TV debates or giving interviews to a TV reporter/anchor of the show on issues that are directly the subject-matter of cases pending before the court and in which they are appearing for one of the sides or taking up the brief of one of the sides soon after the TV show. Such conduct reminds us of the fictional barrister, Rumpole, "the Old Hack of Bailey", who self-deprecatingly described himself as an "old taxi plying for hire". He at least was not bereft of professional values. When a young and enthusiastic journalist invited him to a drink of Dom Perignon, vastly superior and far more expensive than his usual "plonk", "Chateau Fleet Street", he joined him with alacrity but when in the course of the drink the journalist offered him a large sum of money for giving him a story on the case; "why he was defending the most hated woman in England", Rumpole ended the meeting simply saying.

"In the circumstance I think it is best if I pay for the Dom Perignon."

We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and reversed, it will have very deleterious consequences for the administration of justice in the country. No judicial system in a democratic society can work satisfactorily unless it is supported by a Bar that enjoys the unqualified trust and confidence of the people, that shares the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people.

We are glad to note that the amicus fully shared our concern and realized the gravity of the issue. In course of his submissions he eloquently addressed us on the elevated position enjoyed by a lawyer in our system of justice and the responsibilities cast upon him in consequence. His written submissions begin with this issue and he quotes extensively from the address of Shri M.C. Setalvad at the Diamond Jubilee Celebrations of the *Bangalore Bar Association, 1961,* and from the decisions of this Court in *Pritam Pal v. High Court of M.P., 1993 Supp (1) SCC 529, (observations of Ratnavel Pandian, J.)* and *Sanjiv Datta, In Re (1995) 3 SCC 619* (observations of Sawant, J. at pp. 634-35, para 20). We respectfully endorse the views and sentiments expressed by Mr M.C. Setalvad, Pandian, J. and Sawant, J.

Here we must also observe that the Bar Council of India and the Bar Councils of the different States cannot escape their responsibility in this regard. Indeed the Bar Council(s) have very positively taken up a number of important issues concerning the administration of justice in the country. It has consistently fought to safeguard the interests of lawyers and it has done a lot of good work for their welfare. But on the issue of maintaining high professional standards and enforcing discipline among lawyers its performance hardly matches its achievements in other areas. It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council will at least now sit up and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society.

What is trial by media? The expression "trial by media" is defined to mean:

> "The impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny."

In light of the above it can hardly be said that the sting programme telecast by NDTV was a media trial. Leaving aside some stray remarks or comments by the anchors or the interviewees, the programme showed some people trying to subvert the BMW trial and the state of the criminal administration of justice in the country (as perceived by the TV channel and the interviewees). There was nothing in the programme to suggest that the accused in BMW case were guilty or innocent.

The programme was not about the accused but it was mainly about two lawyers representing the two sides and one of the witnesses in the case. It indeed made serious allegations against the two lawyers. The allegations, insofar as R.K. Anand is concerned, stand established after strict scrutiny by the High Court and this Court. Insofar as I.U. Khan is concerned, though this Court held that his conduct did not constitute criminal contempt of court, nonetheless allegations against him too are established to the extent that his conduct has been found to be inappropriate for a Special Public Prosecutor.

In regard to the witness the comments and remarks made in the telecast were never subject to a judicial scrutiny but those too are broadly in conformity with the materials on the court's record. We are thus clearly of the view that the sting programme telecast by NDTV cannot be described as a piece of trial by media.

We are also unable to agree with the submission made by learned Counsel appearing for I.U. Khan that the TV channel should have carried out the stings only after obtaining the permission of the trial court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the court before its telecast. Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the court. On little consideration the idea appears to be quite repugnant both from the points of view of the court and the media.

It would be a sad day for the court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the court would tantamount to pre-censorship of reporting of court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution.

This is, however, not to say that media is free to publish any kind of report concerning a sub judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting operation is an incalculably more risky and dangerous

thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment.

Coming to Section 3 of the Contempt of Court Act, 1971, we fail to see any application of Section 3 (3) of the Contempt of Courts Act in the facts of this case. In this case there is no distribution of any publication made under sub-section (1). Hence, neither sub-section (3) nor its proviso or Explanation is attracted. NDTV did the sting, prepared a programme on the basis of the sting material and telecast it at a time when it fully knew that the BMW trial was going on. Hence, if the programme is held to be a matter which interfered or tended to interfere with, or obstructed or tended to obstruct *the due course of* BMW case then the immunity under sub-section (1) will not be available to it and the telecast would clearly constitute criminal contempt within the meaning of Section 2 (c) (ii) and (iii) of the Act.

But can the programme be accused of interfering or tending to interfere with, or obstructing or tending to obstruct *the due course of* BMW case? Whichever way we look at the programme we are not able to come to that conclusion. The programme may have any other faults or weaknesses but it certainly did not interfere with or obstruct the due course of the BMW trial. The programme telecast by NDTV showed to the people (the courts not excluded) that a conspiracy was afoot to undermine the BMW trial. What was shown was proved to be substantially true and accurate. The programme was thus clearly intended *to prevent* the attempt to interfere with or obstruct the due course of the BMW trial.

Looking at the matter from a slightly different angle we ask the simple question, what would have been in greater public interest: to allow the attempt to suborn a witness, with the object to undermine a criminal trial, lie quietly behind the veil of secrecy or to bring out the mischief in full public gaze? To our mind the answer is obvious. The sting telecast by NDTV was indeed in larger public interest and it served an important public cause.

We have held that the sting programme telecast by NDTV in no way interfered with or obstructed the due course of any judicial proceeding, rather it was intended to prevent the attempt to interfere with or obstruct the due course of law in the BMW trial. We have also held that the sting programme telecast by NDTV served an important public cause. In view of the twin findings we need not go into the larger question canvassed by learned counsel for the NDTV that even if the programme marginally tended to influence the proceedings in the BMW trial the larger public interest served by it was so important that the little risk should not be allowed to stand in its way.

We have unequivocally upheld the basic legitimacy of the stings and the sting programme telecast by NDTV, but at the same time there were some deficiencies or rather the excesses in the telecast. But in the end, that for all its faults, the NDTV rendered valuable service to the important public cause to protect and salvage the purity of the course of justice. We appreciate the

professional initiative and courage shown by the young reporter and painstaking investigation undertaken by NDTV.

We have recounted above the acts of omission and commission by NDTV before the High Court and in the telecast of the sting programme in the hope that the observations will help NDTV and other TV channels in their future operations and programmes. We are conscious that the privately run TV channels in this country are very young, no more than eighteen or twenty years old.

We also find that like almost every other sphere of human activity in the country the electronic news media has a very broad spectrum ranging from very good to unspeakably bad. The better news channels in the country (NDTV being one of them) are second to none in the world in matters of coverage of news, impartiality and objectivity in reporting, reach to the audience and capacity to influence public opinion and are actually better than many foreign TV channels. But that is not to say that they are totally free from biases and prejudices or they do not commit mistakes or gaffes or they sometimes do not tend to trivialize highly serious issues or that there is nothing wanting in their social content and orientation or that they maintain the same standards in all their programmes. In the quest of excellence they have still a long way to go.

A private TV channel which is also a vast business venture has the inherent dilemma to reconcile its business interests with the higher standards or professionalism/demands of profession. The two may not always converge and then the TV channel would find its professional options getting limited as a result of conflict of priorities. The media trips mostly on TRPs (television rating points), when commercial considerations assume dominance over higher standards of professionalism.

It is not our intent here to lay down any reformist agenda for the media. Any attempt to control and regulate the media from outside is likely to cause more harm than good. The norms to regulate the media and to raise its professional standards must come from inside.

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***396. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (b), (c), (g) & (o) Medical negligence – Burden of proof – Onus of proving medical negligence lies on complainant – Factors to be proved by cogent evidence – Mere averment in complaint is not sufficient – Principles laid down in *Bolam v. Friern Hospital Management Committee, (1957) 1 WLR 582* and *Jacob Mathew v. State of Punjab, (2005) 6 SCC 1* restated.**

C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam

Judgment dated 01.05.2009 passed by the Supreme Court in Civil Appeal No. 6168 of 2008, reported in (2009) 7 SCC 130

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*397. **CONSUMER PROTECTION ACT, 1986 – Sections 2 (1) (g), 2 (1) (o) & 14 (1) (d)**

Medical negligence – Death caused by transfusion of wrong blood group – Negligence proved.

Transfusion of mismatched blood is a case of medical negligence – The error is such which ordinarily would not take place if hospital/doctor would have exercised ordinary care – This is not an error of professional judgment – It is a clear-cut case of medical negligence – Highest level of expertise is not expected – In order to determine professional negligence, ordinary standard of scale which should be exercised in that profession, is the considerable factor – In this case, transfusion of the wrong blood group was the cause of the patient's death and not the burn injury which she suffered before being administered with the wrong blood group – Hence, professional negligence of the doctor is contributory factor of the cause of death – Medical negligence proved. [See *Jacob Mathew v. State of Punjab, (2005) 6 SCC 1* and *Martin F. D'Souza v. Mohd. Ishfaq, (2009) 3 SCC 1.*]

Postgraduate Institute of Medical Education and Research, Chandigarh v. Jaspal Singh and others

Judgment dated 29.05.2009 passed by the Supreme Court in Civil Appeal No. 7950 of 2002, reported in (2009) 7 SCC 330

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398. **CONSUMER PROTECTION ACT, 1986 – Sections 2 (1) (o) (g)**
CONTRACT ACT, 1872 – Sections 10, 18, 19 & 37

Nature and object of health insurance by mediclaim policy and obligation of insured to disclose true and full information of material fact and scope of repudiation of insurer's liability on non-disclosure thereof enunciated.

Satwant Kaur Sandhu v. New India Assurance Company Limited

Judgment dated 10.07.2009 passed by the Supreme Court in Civil Appeal No. 2776 of 2002, reported in (2009) 8 SCC 316

Held:

A mediclaim policy is a non-life insurance policy meant to assure the policy holder in respect of certain expenses pertaining to injury, accidents or hospitalizations. Nonetheless, it is a contract of insurance falling in the category of contract *uberrimae fidei*, meaning a contract of utmost good faith on the part of the assured. Thus, it needs little emphasis that when an information on a specific aspect is asked for in the proposal form, an assured is under a solemn obligation to make a true and full disclosure of the information on the subject which is within his knowledge. It is not for the proposer to determine whether the information sought for is material for the purpose of the policy or not. Of

course, the obligation to disclose extends only to facts which are known to the applicant and not to what he ought to have known. The obligation to disclose necessarily depends upon the knowledge one possesses. His opinion of the materiality of that knowledge is of no moment. [See: *Joel v. Law Union & Crown Ins. Co., (1908) 2 KB 863 (CA)*]

In *United India Insurance Co. Ltd. v. M.K.J. Corporation, (1996) 6 SCC 428,* this Court has observed that it is a fundamental principle of insurance law that utmost faith must be observed by the contracting parties. Good faith forbids either party from non- disclosure of the facts which the party privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. [Also see: *Modern Insulators Ltd. v. Oriental Insurance Co. Ltd., (2000) 2 SCC 734*].

MacGillivray on Insurance Law (Tenth Edition) has summarised the assured's duty to disclose as under:

> "...the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured but neither known nor deemed to be known by the insurer. Breach of this duty by the assured entitles the insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms."

Over three centuries ago, in *Carter v. Boehm, (1558-1774) All ER Rep 183,* Lord Mansfield had succinctly summarised the principles necessitating a duty of disclosure by the assured, in the following words:

> "Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back of such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the *risque* run is really different from the *risque* understood and intended to be run at the time of the agreement...The policy would be equally void against the underwriter if he concealed...Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary."

Having said so, as noted above, the next question for consideration would be as to whether the factum of the said illness was a "material" fact for the purpose of a mediclaim policy and its non-disclosure was tantamount to suppression of material facts enabling the Insurance Company to repudiate its liability under the policy.

The term "material fact" is not defined in the Act and, therefore, it has been understood and explained by the Courts in general terms to mean as any fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would like to accept the risk. Any fact which goes to the root of the Contract of Insurance and has a bearing on the risk involved would be "material".

As stated in Pollock and Mulla's Indian Contract and Specific Relief Acts

> 'any fact the knowledge or ignorance of which would materially influence an insurer in making the contract or in estimating the degree and character of risks in fixing the rate of premium is a material fact.'

In this regard, it would be apposite to make a reference to Regulation 2(1)(d) of the Insurance Regulatory and Development Authority (Protection of Policy-holders' Interests) Regulations, 2002, which explains the meaning of term "material". The Regulation reads thus:

> "**2. Definitions.**— In these regulations, unless the context otherwise requires,—
>
> (a) – (c) * * *
>
> (d) 'proposal form' means a form to be filled in by the proposer for insurance, for furnishing all material information required by the insurer in respect of a risk, in order to enable the insurer to decide whether to accept or decline, to undertake the risk, and in the event of acceptance of the risk, to determine the rates, terms and conditions of a cover to be granted;
>
> *Explanation.*– 'Material' for the purpose of these regulations shall mean and include all important, essential and relevant information in the context of underwriting the risk to be covered by the insurer."

Thus, the Regulation also defines the word "material" to mean and include all "important", "essential" and "relevant" information in the context of guiding the insurer to decide whether to undertake the risk or not.

The upshot of the entire discussion is that in a Contract of Insurance, any fact which would influence the mind of a prudent insurer in deciding whether to accept or not to accept the risk is a "material fact". If the proposer has knowledge of such fact, he is obliged to disclose it particularly while answering questions in

the proposal form. Needless to emphasise that any inaccurate answer will entitle the insurer to repudiate his liability because there is clear presumption that any information sought for in the proposal form is material for the purpose of entering into a Contract of Insurance.

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***399. CONSUMER PROTECTION ACT, 1986 – Section 3**
TELEGRAPH ACT, 1885 – Section 7-B
TELEGRAPH RULES, 1951 – Rules 413 & 443
Where there is a special remedy provided in Section 7-B of the Telegraph Act regarding disputes in respect of telephone bills, then the remedy under the Consumer Protection Act, is by implication barred – Rule 413 of the Telegraph Rules provides that all services relating to telephone are subject to the Telegraph Rules – A telephone connection can be disconnected by the Telegraph Authority for default of payment under Rule 443 of the Rules – It is well settled that the special law overrides the general law – Hence, District Consumer Dispute Redressal Forum has no jurisdiction to adjudicate the dispute regarding non-payment of telephone bill for the telephone connection and disconnection thereof.

General Manager, Telecom v. M. Krishnan and another

Judgment dated 01.09.2009 passed by the Supreme Court in Civil Appeal No. 7687 of 2004, reported in (2009) 8 SCC 481

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400. CONSUMER PROTECTION ACT, 1986 – Section 14
CONTRACT ACT, 1872 – Section 73
Once the insurer has reached a settlement, he should make the payment at the earliest, otherwise insurer is liable to pay interest at the current rate of interest to the consumer as compensation for delay caused in payment.

Sri Venkateswara Syndicate v. Oriental Insurance Company Limited and another

Judgment dated 24.08.2009 passed by the Supreme Court in Civil Appeal No. 4487 of 2004, reported in (2009) 8 SCC 507

Held:

This Court in various judgments has held that the award of compensation must depend on facts and circumstances of each case and has to be worked out after determining the amount of loss suffered by the consumer.

In Govt. of Orissa v. G.C. Roy, (1992) 1 SCC 508, this court has stated that: (SCC pp. 532-33, para 43)

> "a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the

deprivation, call it by any name. It may be called interest, compensation or damages."

It was observed in the case of *GDA v. Balbir Singh, (2004) 5 SCC 65,* that: (SCC pp. 85, para 18)

> "18.... it is already held that awarding interest at a flat rate of 18% is not justified. It is clear that in all these cases interest is being awarded as and by way of compensation/ damages. Whilst so awarding it must be shown that there is relationship between the amount awarded and the default/unjustifiable delay/harassment. It is thus necessary that there be separate awards under each such head with reasons why such award is justified."

In the case of *Kaushnuma Begum v. New India Assurance Co. Ltd., (2001) 2 SCC 9,* this court has held that: (SCC P. 16, para 24)

> "24. .... with a change in economy and the policy of Reserve Bank of India the interest rate has been lowered. The nationalized banks are now granting interest at the rate of 9% on fixed deposits for one year. We, therefore, direct that the compensation amount fixed hereinbefore shall bear interest at the rate of 9% per annum from the date of the claim made by the appellants."

In the case before us it has been made clear that if the insurer is not satisfied with the assessment of the surveyor, he retains the right to settle claim for a different amount. The insurer after rejecting the assessments of the surveyor and the joint surveyor has accepted the assessment made by the Chartered Accountant. Therefore, it would not be correct to say that insurer while settling the claim has caused an unnecessary delay of three years. But once the insurer has reached a settlement he should make the payment at the earliest. And if further delay is caused by the insurer in making the payment then he should be made liable to pay the interest on the amount settled, as compensation at the current rate of interest till the payment is made, as it has deprived the appellant from using his money for which he is legitimately entitled.

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401. COURT FEES ACT, 1870 – Section 7 (iv) (c) and Art. 17 (iii) of Schedule II CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11
Void or viodable document – *Ad valorem* court fees, payment of – Depends upon the averments made in the plaint – Court has to find out whether a transaction is alleged to be void or voidable – In case of void document, it is not necessary to seek the relief of cancellation of document and *ad valorem* court fee is not required to be paid – If document is voidable, at the instance of executant, it is necessary for the plaintiff to pay *ad valorem* court fee.

Manzoor Ahmed v. Jaggi Bai and others

Judgment dated 25.8.2009 passed by the High Court in Writ Petition No. 7324 of 2009, reported in 2009 (4) MPHT 347 (DB)

Held:

The main question for consideration is whether *ad valorem* Court fees is required to be paid. Document is shown to be void not voidable. Plaintiff has averred that she was never told about the sale deed which has been obtained by playing fraud. She never intended to execute the sale deed, she wanted to obtain the loan and taking the advantage of her advanced age and disability, sale deed was obtained. No consideration was paid. The averments made in the plaint indicate that document is shown to be void not voidable. There is difference of incidence of payment of Court fees incased document is voidable at the instance of executant *ad valorem* Court fees is required to be paid, not in the case of void document in such cases injunction which has been prayed flows from the relief of declaration. In case of void document, it is not necessary to seek the relief of cancellation of document itself, it is only in the cases of voidable documents, it is necessary to seek the relief of cancellation of document itself, it is only in the cases of voidable documents, it is necessary to claim such a relief. This question was considered by this Court in *Pratap and another v. Punia Bai and others, 1976 JLJ 703,* thus: –

> "5. Learned Counsel for the applicant relied mainly on the Full Bench decision of this Court in *Santoshchandra and others v. Gyansunder Bai, 1970 JLJ 290 = 1970 MPLJ 363 (FB).* It was held in that case that where it is necessary for a plaintiff to avoid an agreement or a decree or a liability imposed, he must seek the relief of having that decree, agreement, instrument or liability set aside and he is not entitled to a declaration simpliciter in such cases. This decision was followed in *Sunderbai v. Manohar Singh Yadav, 1974 JLJ Short Note 75.* In that case, plaintiff had filed a suit for a declaration and for permanent injunction alleging that the sale deed in question was got executed by her by playing fraud. The plaintiff was held liable to pay an *ad valorem* Court fees under Section 7 (c) of the Court Fees Act. From the aforesaid decisions it is clear that where a person who is a party to an agreement or transaction and his allegation is that it is not binding on him because it was obtained by misrepresentation or fraud, it is necessary for him to seek the consequential relief of setting aside such agreement or transaction and as such the suit falls within the purview of Section 7 (c) of the Court Fees Act. But the question of avoiding an agreement or an instrument arises only where it is voidable. If it is wholly void a mere declaration that it is

so, is sufficient and it is not necessary for the plaintiff to seek the relief of setting aside something which has no existence in law. It is not necessary to ask for relief of setting aside an agreement or an instrument which is wholly void.

6. The question whether the suit is really one for a declaration with the consequential relief or not has to be determined by looking to the pleadings of the plaintiff only, vide *Manohar Singh Natha Singh v. Parmeshwari and others, AIR 1949 Nag. 211.* If we carefully examine the allegations in the plaint it would appear that the case of the plaintiff is that she did not execute the sale deed in question, that she did not receive any consideration of the sale and that she was not a party to any document of sale. From these allegations it would appear that there was no sale at all and the plaintiff is merely seeking a declaration that she did not execute the sale deed in question and thus did not transfer any property to the defendants. As such it is not necessary for her to seek relief of setting aside the sale deed in question, because, as pointed out above, the question of seeking the relief of setting aside something which has no existence in law, does not arise. In such a case bare declaration would suffice.

7. Voidable transfer remains valid until avoided and, therefore, it is necessary to avoid it by seeking the relief of setting it aside. But a transaction, which is void ab initio, must be deemed to have never taken place. It is not to be regarded as an alienation which is perfect till it is set aside. There is a clear distinction between a fraudulent misrepresentation as to the character of a document and as to contents as well as character of the document, the transaction is wholly void."

It depends upon the averments made in each case in the plaint whether *ad valorem* Court fees is payable or not. Court has to find out whether a transaction is alleged to be "void" or "voidable". In case of void document, it is not necessary to seek the relief of cancellation of document. Similar view was taken by *Nagpur High Court in Secretary of State v. Dadoo Ghanshyamsingh Gupta and others, AIR 1937 Nagpur 14.* It has been laid down that if on averments made in the plaint, the substantial relief could not be other than one for a declaratory decree and it is coupled with another relief, which follows naturally in the wake of the declaration, then the case must be regarded as falling within the ambit of Section 7 (vi) (c). This Court in *Ashok Kumar Gehani and another v. Ramhet Agrawal and another, 2008 (1) MPLJ 116* has relied upon *Pratap and another v. Punia Bai and others* (supra) and came to the similar conclusion. In *Smt. Sabina alias Farida v. Mohd. Abdul Wasit, AIR 1997 MP 25,* relief of injunction was not consequential relief, it was claimed because of settled possession of

plaintiff, thus, ad valorem Court fees was not required to be paid. In the instant case also, plaintiff is claimed to be in possession, she is not claiming relief for possession, thus, it could not be said that ad valorem Court fees is required to be paid. When declaratory relief is the main relief has also been considered in *Johan Ram v. Dasmat Bai, 1982 MPWN 464, Vibhuti Narain Singh v. Municipal Board, Allahabad, AIR 1958 Allahabad 41, Bhupat Singha and others v. Jnanendra Kumar Chowdhury and others, AIR 1955 Calcutta 341, Jatindra Nath Nandi and others v. Krishnadhan Nandi and another, AIR 1953 Calcutta 34, Balram Mandal v. Sehebjan and others, AIR 1950 Calcutta 85, Burjor Pestonji Sethna v. Nariman Minoo Todiwala and others, AIR 1953 Bombay 382 and in Messrs. Kalla Surayya and Sons represented by Kalla Venkataraju v. Province of Madras, represented by the Collector of East Godavari at Kakinada and another, AIR 1949 Madras 778.*

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***402. CRIMINAL PROCEDURE CODE, 1973 – Sections 125 (1) (b) & 125 (3)**
MAJORITY ACT, 1875 – Section 3
LIMITATION ACT, 1963 – Section 15 (1)

(i) An application for grant of maintenance under Section 125 (1) (b), maintainability of – Is maintainable till they attain majority as the cause of action for grant of maintenance would arise only in the event a person having sufficient means, neglects or refuses to maintain his legitimate or illegitimate minor children unable to maintain themselves – Hence, once the children attain majority, the said provisions would cease to apply to their cases (except cases under Section 125 (1) (c) CrPC).

(ii) The limitation of one year under Section 125 (3) CrPC for filing application for execution of maintenance order passed under Section 125 (1) CrPC is subject to Section 15 (1) of the Limitation Act, 1963 – Hence, the limitation for filing application for execution would be computed upon excluding the period during which the order of stay granted by the Revisional Court or High Court was operating.

Amarendra Kumar Paul v. Maya Paul and others

Judgment dated 04.08.2009 passed by the Supreme Court in Criminal Appeal No. 1413 of 2009, reported in (2009) 8 SCC 359

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403. CRIMINAL PROCEDURE CODE, 1973 – Sections 173 (2), (8) and 200
Criminal case – Complainant's rights and options against accused are: he has right –

(i) to be given notice on filing of police report;

(ii) to file a protest petition, which may be treated as complaint by Magistrate; and

(iii) to question the fairness of investigation and demand fresh investigation.

Further investigation – Nature and scope under Section 173 (3) and (8) of CrPC explained.

Kishan Lal v. Dharmendra Bafna and another

Judgment dated 21.07.2009 passed by the Supreme Court in Criminal Appeal No. 1283 of 2009, reported in (2009) 7 SCc 685

Held:

It is now a well-settled principle of law that when a final form is filed by any investigating officer in exercise of his power under sub-section (2) of Section 173 of the Code, the first informant has to be given notice. He may file a protest petition which in a given case may be treated to be a complaint petition, on the basis whereof after fulfilling the other statutory requirements cognizance may be taken. The learned Magistrate can also take cognizance on the basis of the materials placed on record by the investigating agency. It is also permissible for a learned Magistrate to direct further investigation. The investigating officer when an FIR is lodged in respect of a cognizable offence, upon completion of the investigation would file a police report.

We are, however, not oblivious of the fact that recently a Division Bench of this Court in *Sakiri Vasu v. State of U.P., (2008) 2 SCC 409* while dealing with the power of the Court to direct the police officer to record an FIR in exercise of power under Section 156 (3) of the Code observed that the Magistrate had also a duty to see that the investigation is carried out in a fair manner (correctness whereof is open to question).

An order of further investigation can be made at various stages including the stage of the trial, that is, after taking cognizance of the offence. Although some decisions have been referred to us, we need not dilate thereupon as the matter has recently been considered by a Division Bench of this Court in *Mithabhai Pashabhai Patel v. State of Gujarat, (2009) 6 SCC 332* in the following terms: (SCC pp. 336-37, paras 12-13)

> "12.This Court while passing the order in exercise of its jurisdiction under Article 32 of the Constitution of India did not direct reinvestigation. This Court exercised its jurisdiction which was within the realm of the Code. Indisputably the investigating agency in terms of sub-section (8) of Section 173 of the Code can pray before the Court and may be granted permission to investigate into the matter further. There are, however, certain situation, where such a formal request may not be insisted upon.
>
> 13. It is, however, beyond any cavil that 'further investigation' and 'reinvestigation' stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely under Articles 226 and 32 of the Constitution of India could direct a 'State' to get an offence investigated and/or further investigated by a different agency.

Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. Pasayat J. in *Ramachandran v. R. Udhayakumar, (2008) 5 SCC 413,* opined as under: (SCC p. 415, para 7)

> '7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation.' "

We have referred to the aforementioned decision only because the learned counsel for the appellant contends that in effect and substance the prayer of the appellant before the learned Magistrate was for reinvestigation but the learned Magistrate had directed further investigation by the investigating officer inadvertently.

The investigating officer may exercise his statutory power of further investigation in several situation as, for example, when new facts come to his notice; when certain aspects of the matter had not been considered by him and he found that further investigation is necessary to be carried out from a different angle(s) keeping in view the fact that new or further materials came to his notice. Apart from the aforementioned grounds, the learned Magistrate or the superior courts can direct further investigation, if the investigation is found to be tainted and/or otherwise unfair or is otherwise necessary in the ends of justice. The question, however, is as to whether in case of this nature a direction for further investigation would be necessary.

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404. CRIMINAL PROCEDURE CODE, 1973 – Section 190

Second complaint petition – Cognizance thereupon – Held, second complaint can lie only on fresh facts and/or if a special case is made out therefor – Where the second complaint petition reiterating the same allegations as were made in the first complaint petition and it does not disclose any such exceptional case, cognizance of the offence cannot be taken upon such second complaint petition – Legal position explained.

Hiralal & Ors. v. State of U.P. & Ors.

Judgment dated 08.04.2009 passed by the Supreme Court in Criminal Appeal No. 662 of 2009, reported in AIR 2009 SC 2380

Held:

A civil suit was filed by the respondent in the court of Civil Judge, Senior Division, Gautam Budh Nagar, inter alia, praying for cancellation of the said Will on the premise that the said Will was a forged one. The said suit was dismissed by an order dated 29.3.2006. An appeal thereagainst is said to be pending.

Respondent No.3 filed a complaint petition in the Court of ACJM, Gautam Budh Nagar which was marked as Complaint Case No.212 of 2003 under Sections 420, 462, 467, 468 and 471 IPC, inter alia, contending that the Will dated 1.8.2006 purported to have been executed by Tika Ram Tyagi in favour of his daughter Suman Devi was a forged and fabricated document. The learned ACJM, Gautam Budh Nagar, however, dismissed the said complaint petition, stating :

> "Case called. Complainant is not present. No record has been submitted in compliance of the earlier order. File be put up at 3 pm for order.
>
> Photocopy of the Khatauni has been submitted by the complainant in which the names of Mukesh and other co-shareholders are mentioned in Khata Khatauni No.22, Khet No.59. Only becoming a co-shareholder of the land does not prove a sale deed or Will as fake or sham document. Since Tika Ram's name is also one of the co- shareholders and the alleged sale deed and Will has not been declared to be fake or bogus by any other court, therefore, in the light of the record available in case file and oral evidence, no prima facie case is made out against the accused persons.
>
> The complaint under Section 203 is hereby rejected."

Respondent No.3 thereafter filed another application under Section 156(3) of the Code of Criminal Procedure, 1973 (Code) making similar allegations.

The order of learned ACJM in his order dated 2.4.2003 is not a cryptic one. Reasons have been assigned in support thereof. In a situation of this nature, in our opinion, a second complaint petition could not have been filed.

Strong reliance has been placed by learned counsel for the respondent on a decision of this Court in *Mahesh Chand v. B. Janardhan Reddy & Anr., (2003) 1 SCC 734,* wherein it was opined that second complaint was not completely barred in law. This Court, however, in that decision itself held that the second complaint can lie only on fresh facts and/or if a special case is made out therefor, stating:

> "19. Keeping in view the settled legal principles, we are of the opinion that the High Court was not correct in holding that the second complaint was completely barred. It is settled law that there is no statutory bar in filing a second complaint on the same facts. In a case where a previous complaint is dismissed without assigning any reasons, the Magistrate under Section 204 Cr.P.C. may take cognizance of an offence and issue process if there is sufficient ground for proceeding. As held in Pramatha Nath Talukdar case second complaint could be dismissed after a decision has been given against the complainant in previous matter upon a full consideration of his case. Further, second complaint

on the same facts could be entertained only in exceptional circumstances, namely, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced. In the facts and circumstances of this case, the matter, therefore, should have been remitted back to the learned Magistrate for the purpose of arriving at a finding as to whether any case for cognizance of the alleged offence had been made out or not."

The second complaint petition filed by the third respondent does not disclose any such exceptional case. It reiterated the same allegations as were made in the first complaint petition. No fresh fact was brought to the notice of the court. The core contention raised in both the complaint petitions was alleged execution of a forged Will by Tika Ram Tyagi.

For the reasons aforementioned, we are of the opinion that it was not a fit case where cognizance of the offence could have been taken or any summons could have been issued. The impugned judgment, thus, cannot be upheld. It is set aside accordingly. The appeal is, therefore, allowed.

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405. CRIMINAL PROCEDURE CODE, 1973 – Sections 244, 245 & 246
Discharge of accused and framing of charge – The words "at any previous stage of the case" as appearing in Section 245 (2) would not have the same meaning as those words appearing in Section 246 (1) – Where the trial Court has rejected the discharge application filed under Section 242 (2), it cannot straightaway proceed to frame the charge without taking recourse of recording the evidence under Section 244 – Legal position explained.

Ajoy Kumar Ghose v. State of Jharkhand & Anr.

Judgment dated 18.03.2009 passed by the Supreme Court in Criminal Appeal No. 485 of 2009, reported in AIR 2009 SC 2282

Held:

Where an application for discharge filed by the accused under Section 245 (2), was rejected by the Trial Court, it cannot straightway proceed to frame charge under Section 246 (1) even without any evidence having been taken under Section 244. The right of the accused to cross-examine the witnesses at the stage of Section 244 (1) CrPC would be completely lost, if the view is taken that even without the evidence, a charge can be framed under Section 246 (1) CrPC. The right of cross examination is a very salutary right and the accused would have to be given an opportunity to cross-examine the witnesses, who have been offered at the stage of Section 244 (1) CrPC. The accused can show,

by way of the cross examination, that there is no justifiable ground against him for facing the trial and for that purpose, the prosecution would have to offer some evidence. While interpreting this Section, the prejudice like to be caused to the accused in his losing an opportunity to show to the Court that he is not liable to face the trial on account of there being no evidence against him, cannot be ignored. Thus, true impact of the clause "at any previous stage of the case" could only mean that even with a single witness, Magistrate could proceed to frame the charge.

Moreover, ordinarily, the scheme of the Section 246 CrPC is that, it is only on the basis of any evidence that the Magistrate has to decide as to whether there is a ground to presume that the accused has committed an offence triable under this Chapter. While Section 245 (2) CrPC speaks about the discharge of the accused on the ground that the charge is groundless. Section 246 (1) operates in entirely different sphere. An order under Section 245 (2) CrPC results in discharge of the accused, whereas, an order under Section 246 CrPC creates a situation for the accused to face a full-fledged trial. Therefore, the two Sections would have to be interpreted in slightly different manner, keeping in mind the different spheres, in which they operate. The words "or at any previous stage of the case" appearing in Section 246 CrPC would include Section 245 also, where the accused has not been discharged under Section 245 CrPC, while the similar term in Section 246 (2) can include the stage even before any evidence is recorded. It cannot, therefore, be held that the words "at any previous stage of the case" as appearing in Section 245 CrPC, would have to be given the same meaning when those words appear in Section 246 CrPC.

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406. CRIMINAL PROCEDURE CODE, 1973 – Section 427 (1) & (2) Commencement of sentence of imprisonment or imprisonment for life to a person already undergoing sentence of imprisonment or imprisonment for life – Held, provisions of Section 427 of CrPC have to be followed.

Sanjeev Meena v. State of M.P. & Anr.

Judgment dated 18.03.2009 passed by the High Court in M.Cr.C. No. 1540 of 2009, reported in 2009 (III) MPJR 307

Held:

Section 427 of Code of Criminal Procedure reads as follows:

> "427 : (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence :

Provided that where as person who has been sentenced to imprisonment by an order under S. 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence".

From bare perusal of Section 427 of the Code, it appears that there are two different situations. As per Section 427(1), when a person already undergoing sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or to imprisonment for life, then his second sentence shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that subsequent sentence shall run concurrently with such previous sentence. In that condition, the accused has to take permission of the Court that subsequent sentence imposed upon him, shall run concurrently with his previous sentence.

Hon'ble Apex Court in para 11 of the case of *Kudva v. State of Andhra Pradesh, 2007 CriLJ 763* has held as under:

"11. However, in this case, the provision of Section 427 of the Code was not invoked in the original cases or in the appeals. A separate application was filed before the High Court after the special leave petitions were dismissed. Such an application, in our opinion, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature as it had not exercised such jurisdiction while passing the judgment in appeal Section 482 of the Code was, therefore, not an appropriate remedy having regard to the fact that neither the Trial Judge, nor the High Court while passing the judgments of conviction and sentence indicated that the sentences passed against the appellant in both the cases shall run concurrently or Section 427 would be attracted. The said provision, therefore, could not be applied in a separate and independent proceeding by the High Court. The appeal being devoid of any merit is dismissed".

In the light of above legal proposition, it is apparent that in above situation the prayer to the effect that subsequent sentence passed on subsequent conviction is to run concurrently with previous sentence, is to be made before

the concerned Court or before the appellate Court as observed by bench of this Court in *Kamal Singh v. State of M.P., ILR (2007) M.P. 1835.*

So far as Sub Section 2 of Section 427 of Code is concerned, the situation is different here. From bare perusal of Sub Section 2, it is apparent that when a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence. In that situation, there is no requirement for any direction of the Court as subsequent sentence will automatically run concurrently with previous sentence.

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407. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 & 439
CONSTITUTION OF INDIA – Article 21
Grant of interim bail – Prayer for grant of bail during pendency of regular bail application may be considered by the Court concerned which has discretionary inherent powers to grant bail.
Sukhwant Singh and others v. State of Punjab
Judgment dated 18.05.2009 passed by the Supreme Court in SLP (Crl.) No. 3529 of 2009, reported in (2009) 7 SCC 559

Held :

Following the decision of this Court in the case of *Kamlendra Pratap Singh v. State of U.P., (2009) 4 SCC 437,* we reiterate that a Court hearing a regular bail application has got inherent power to grant interim bail pending final disposal of the bail application. In our opinion, this is the proper view in view of Article 21 of the Constitution of India which protects the life and liberty of every person.

When a person applies for regular bail then the court concerned ordinarily lists that application after a few days so that it can look into the case diary which has to be obtained from the police authorities and in the meantime the applicant has to go to jail. Even if the applicant is released on bail thereafter, his reputation may be tarnished irreparably in society. The reputation of a person is his valuable asset, and is a facet of his right under Article 21 of the Constitution vide *Deepak Bajaj v. State of Maharashtra (2008) 16 SCC 14.* Hence, we are of the opinion that in the power to grant bail there is inherent power in the court concerned to grant interim bail to a person pending final disposal of the bail application. Of course, it is in the discretion of the court concerned to grant interim bail or not but the power is certainly there.

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408. CRIMINAL PROCEDURE CODE, 1973 – Section 438
Scope and power to grant "anticipatory bail" reiterated and correctness of some observations regarding anticipatory bail made in *Adri Dharan Das v. State of W.B., (2005) 4 SCC 303* and *Balchand Jain v. State of M.P., (1976) 4 SCC 572* are doubted in the light of *Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565.*

Savitri Agarwal and others v. State of Maharashtra and another
Judgment dated 10.07.2009 passed by the Supreme Court in Criminal Appeal No. 1178 of 2009, reported in (2009) 8 SCC 325

Held:

Section 438 of the Code confers on the High Court and the Court of Session, the power to grant 'anticipatory bail' if the applicant has 'reason to believe' that he may be arrested on accusation of having committed a non-bailable offence.

The expression 'anticipatory bail' has not been defined in the Code. But as observed in *Balchand Jain v. State of M.P., (1976) 4 SCC 572* 'anticipatory bail' means 'bail in anticipation of arrest'. The expression 'anticipatory bail' is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. When a competent court grants 'anticipatory bail', it makes an order that in the event of arrest, a person shall be released on bail. There is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative.

The Court went on to observe (*Balchand case* (supra), SCC p. 576, para 2) that the

> "power of granting `anticipatory bail' is somewhat extraordinary in character and it is only in `exceptional cases' where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or 'there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail' that such power [may] be exercised."

The power being rather unusual in nature, it is entrusted only to the higher echelons of judicial service, i.e. a Court of Session and the High Court. Thus, the ambit of power conferred by Section 438 of the Code was held to be limited.

In *Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565,* the Constitution Bench inter alia observed that the Legislature has conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail since it felt, *firstly*, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and *secondly*, because the intention was to allow the higher courts in the echelon a somewhat free hand in the matter of grant of relief in the nature of anticipatory bail.

While cautioning against imposition of unnecessary restrictions on the scope of the Section, because, in its opinion, over generous infusion of constraints and conditions, which were not to be found in Section 438 of the Code, could make the provision constitutionally vulnerable, since the right of personal freedom, as enshrined in Article 21 of the Constitution, cannot be made to depend on compliance with unreasonable restrictions, the Constitution Bench laid down the following guidelines, which the Courts are required to keep in mind while dealing with an application for grant of anticipatory bail:

(i) Though the power conferred under Section 438 of the Code can be described as of an extraordinary character, but this does not justify the conclusion that the power must be exercised in exceptional cases only because it is of an extraordinary character. Nonetheless, the discretion under the Section has to be exercised with due care and circumspection depending on circumstances justifying its exercise.

(ii) Before power under sub-section (1) of Section 438 of the Code is exercised, the Court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge the reasonableness of his belief, the existence of which is the *sine qua non* of the exercise of power conferred by the Section.

(iii) The observations made in Balchand Jain's case (supra), regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot be treated as conclusive on the point. There is no warrant for reading into Section 438, the conditions subject to which bail can be granted under Section 437(1) of the Code and therefore, anticipatory bail cannot be refused in respect of offences like criminal breach of trust for the mere reason that the punishment provided for is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

(iv) No blanket order of bail should be passed and the Court which grants anticipatory bail must take care to specify the offence or the offences in respect of which alone the order will be effective. While granting relief under Section 438(1) of the Code, appropriate conditions can be imposed under

Section 438(2) so as to ensure an uninterrupted investigation. One such condition can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the recovery. Otherwise, such an order can become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed.

(v) The filing of First Information Report (FIR) is not a condition precedent to the exercise of power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

(vi) An anticipatory bail can be granted even after an FIR is filed so long as the applicant has not been arrested.

(vii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

(viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of respective contentions of the parties. The ad-interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage.

(ix) Though it is not necessary that the operation of an order passed under Section 438(1) of the Code be limited in point of time but the Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of FIR in respect of the matter covered by the order. The applicant may, in such cases, be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonable short period after the filing of the FIR.

At this juncture, it would be appropriate to note that the view expressed by this Court in *Adri Dharan Das v. State of W.B., (2005) 4 SCC 303* to the effect that while dealing with an application under Section 438 of the Code, the Court cannot pass an interim order restraining arrest as it will amount to interference in the investigation, does not appear to be in consonance with the opinion of the Constitution Bench in *Sibbia's case* (supra).

Similarly, the observation that power under Section 438 is to be exercised only in exceptional cases seems to be based on the decision in *Balchand's case* (supra), which has not been fully approved by the Constitution Bench. On this aspect, the Constitution Bench stated thus: [*Sibbia case* (supra) SCC p. 586, para 25]

> "25. ... The observations made in Balchand Jain regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot therefore be treated as concluding the points which arise directly for our consideration. We agree, with respect, that the power conferred by Section 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that, it is not possible to agree with the observations made in Balchand Jain in an altogether different context on an altogether different point".

It would also be of some significance to mention that Section 438 has been amended by the Code of Criminal Procedure (Amendment) Act, 2005. The amended Section is more or less in line with the parameters laid down in *Sibbia's case* (supra). However, the amended provision has not yet been brought into force.

[Note : In this context also see *Union of India v. Padam Narain Aggarwal etc., AIR 2009 SC 254 = Note No. 186 page 234 of JOTI Journal 2009*].

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409. CRIMINAL PROCEDURE CODE, 1973 – Section 464
INDIAN PENAL CODE, 1860 – Sections 302 and 149
EVIDENCE ACT, 1872 – Section 3
Non-mentioning of Section 149 IPC specifically in the charge is not fundamental defect, if accused failed to show any prejudice, particularly when all necessary ingredients of Section 149 IPC are implicit in the charge u/s 302 IPC.
Injured witnesses – Credibility of testimony – In the incident, large number of persons attacked deceased and injured witnesses – Such witnesses not mentioning specific overt act of individual accused – Not ground to discard – It would not be possible for such witnesses to attribute specific injury individually to each accused.
Anna Reddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh
Judgment dated 21.04.2009 passed by the Supreme Court in Criminal Appeal No. 408 of 2007, reported in AIR 2009 SC 2661

Held:

PW-1 and PW-3 are injured witnesses. As a matter of fact, PW-1 suffered a grave injury on his head. Two of their family members died. Why should he and PW-3 let real culprits go scot-free ? It is most unlikely that they would have spared the actual assailants and falsely implicated these appellants merely because there is political rivalry between them. The omissions and discrepancies pointed out in the evidence of PW-1 and PW-3 are only minor and do not shake their trustworthiness. It is true that neither PW-1 nor PW-3 assigned specific injuries or specific overt acts attributed to the accused individually but looking to the nature of the incident where large number of persons attacked D-1, D-2 PW-1, PW-2 and PW-3, it would not have been possible for PW-1 or PW-3 to attribute specific injury individually to each accused. How could it be possible for any person to recount with meticulous exactitude the various individual acts done by each assailant ? Had they stated so, their testimony would have been criticized as highly improbable and unnatural. The testimony of eye-witnesses carries with it the criticism of being tutored if they give graphic details of the incident and their evidence would be assailed as unspecific, vague and general if they fail to speak with precision. The golden principle is not to weigh such testimony in golden scales but to view it from the cogent standards that lend assurance about its trustfulness. In our view, the testimony of PW-1 and PW-3 is of credence and does not deserve to be discarded on the ground of non-mentioning of specific overt acts. The trial court and the High Court have given cogent and convincing reasons for accepting the evidence of PW-1 and PW-3. We concur. Merely because A-14 and A-15 got acquittal, in our view, credibility of deposition of PW-1 and PW-3 is not affected.

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***410. DELHI RENT CONTROL ACT, 1958 – Sections 14 (1) (a), 14 (2), 15 (6), 26 & 27**

(i) The tenants are required to be evicted under Section 14 (1) (a) of the Act on default of payment of arrears of rent within two months of the date of service of demand notice in the prescribed manner – An additional protection has been given to the tenant under Section 14 (2) – If the tenant makes payment or deposit the rent as required by Section 15 (6), then no order for recovery of possession of the tenanted premises shall be made under Section 14 (1) (a) – However, if the tenants have obtained such benefit once in respect of any premises and makes a further (second) default in payment of rent of those premises for three consecutive months, then as per proviso to Section 14 (2) of the Act, no protection can be given to the tenant for eviction.

(ii) Sections 26 and 27 of the Act also provides that if the landlord has not given receipt of the rent paid or has not accepted the rent tendered by the tenant within the prescribed time, then tenant has to deposit such rent with the Rent Controller in the

prescribed manner – Though, Section 27 has used the word 'may' but looking to the object of the provisions it must be construed as mandatory and failure to deposit such rent with the Rent Controller by the tenant in case of second default would be ground for his eviction under Section 14 (1) (a) r/w proviso of Section 14 (2) – Such a cannon of construction is certainly warranted otherwise the intention of the legislature would be defeated and the class of landlords, for whom also, the beneficial provisions have been made for recovery of possession from the tenants on certain grounds, will stand deprived of them.

Sarla Goel and others v. Kishan Chand

Judgment dated 08.07.2009 passed by the Supreme Court in Civil Appeal No. 4162 of 2009, reported in (2009) 7 SCC 658

[Note : The provisions of Delhi Rent Control Act referred to in above case are similar to the provisions of Sections 12 (1) (a), 12 (3), 13 (5), 24 and 25 of M.P. Accommodation Control Act, 1961.]

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411. EVIDENCE ACT, 1872 – Section 9

Test identification parade, non-holding of – Insignificant because test identification parade was not held as the appellant-accused had refused to take part in the test identification parade on the ground that he was already shown to injured witnesses by the police – The witness had opportunity to see him from close quarters for a reasonable time and had also grappled with him – The accused-appellant was identified in Court by the witness – The identity of appellant/accused established.

Jaswinder Singh v. State of Punjab

Judgment dated 07.07.2009 passed by the Supreme Court in Criminal Appeal No. 900 of 2006, reported in (2009) 7 SCC 792

Held:

A very strong argument was made before us by the defence in respect of the identity of the appellant particularly on the ground that he was shown to the witness before any TIP could be held. On going through the records we find that the appellant-accused had refused to take part in the TIP taking up the plea that he was already shown to Jasprit Singh, PW 1 by the police.

We cannot accept the aforesaid plead taken by the appellant-accused for the simple reason that PW 1 had occasion to seen the appellant not only when he opened the door but also when he took both of them to the room where Jasbir Singh alias Tota, the deceased was watching the television. Moreover, he grappled with both of them. He himself received gunshot injuries in his hand as also on leg from the gun fired by the appellant. He described the whole incident in his deposition as to how he received those injuries.

PW 1 had seen the appellant-accused from close quarters and also for a reasonable time. He has also identified the appellant-accused in the court as the person who had fired upon him. His evidence is corroborated by the medical evidence of the doctor who examined him. Therefore, there could be no dispute with regard to the identity of the appellant-accused.

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412. EVIDENCE ACT, 1872 – Sections 43 and 78

Judgment in criminal case is not admissible in civil case – However, admission made by a party in previous criminal case is admissible in subsequent civil case.

Seth Ramdayal Jat v. Laxmi Prasad

Judgment dated 15.04.2009 passed by the Supreme Court in Civil Appeal No. 2543 of 2009, reported in AIR 2009 SC 2463

Held:

It is now almost well-settled that, save and except for Section 43 of the Indian Evidence Act which refers to Sections 40, 41, and 42 thereof, a judgment of a criminal court shall not be admissible in a civil suit.

What, however, would be admissible is the admission made by a party in a previous proceeding. The admission of the appellant was recorded in writing. While he was deposing in the suit, he was confronted with the question as to whether he had admitted his guilt and pleaded guilty of the charges framed. He did so. Having, thus, accepted that he had made an admission in the criminal case, the same was admissible in evidence. He could have resiled therefrom or explained away his admission. He offered an explanation that he was wrongly advised by the counsel to do so. The said explanation was not accepted by the trial court. It was considered to be an afterthought. His admission in the civil proceeding was admissible in evidence.

A judgment in a criminal case, thus, is admissible for a limited purpose. Relying only on or on the basis thereof, a civil proceeding cannot be determined, but that would not mean that it is not admissible for any purpose whatsoever.

We, therefore, are of the opinion that although the judgment in a criminal case was not relevant in evidence for the purpose of proving his civil liability, his admission in the civil suit was admissible. The question as to whether the explanation offered by him should be accepted or not is a matter which would fall within the realm of appreciation of evidence. The Trial Court had accepted the same. The first appellate court refused to consider the effect thereof in its proper perspective. The appellate court proceeded on the basis that as the judgment of the criminal court was not admissible in evidence, the suit could not have been decreed on the said basis. For the said purpose, the admission made by the appellant in his deposition as also the effect of charge had not been taken into consideration.

We, therefore, are of the opinion that the High Court cannot be said to have committed any error in interfering with the judgment of the first appellate court.

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413. EVIDENCE ACT, 1872 – Sections 101 & 102
PUBLIC TRUST:

(i) Burden of establishing a case – Is not constant but fluctuates and shifts to the other party subject to production of evidence by one party.

(ii) Plaintiffs filed a suit in representative capacity for declaration and injunction pleading that the disputed temple is 100 years old and is public property while the defendant is trying to destroy the temple and raise a construction over the place of temple and to convert it into a private property – Defendant in his written statement pleaded that the disputed place was sold to Ghyanashyam Das and Balkishan by the Ayodhya Mandir Trust, Sant Niwas Trust, Indore and the Trust was the owner of the property – He further pleaded that the property was purchased by him from Balkishan and that the temple is not a public temple – The defendant also filed a counter claim and sought permanent injunction against plaintiff Rameshwar Dayal that he be restrained from creating nuisance and obstruction – Trial Court dismissed the suit holding that the plaintiffs failed to prove that the temple is a public temple and that the defendant purchased the suit property by a registered sale deed from a public trust – Held, the plaintiffs have discharged their burden to prove that there is a temple situated for a quite long time i.e. for the last 100 years then, the burden was on the defendant to show that the temple was constructed as a private temple – It is also clear from evidence that before creation of the public trust by Seth Prahlad Das, the temple was a part of his property and thereafter it became a part and parcel of the public trust and hence, the temple was in the ownership of the public trust – Further held, being a public temple, the trust had no right to sell the temple, neither the defendant no. 1 has a right to raise any construction over the area of temple.

Deshraj Singh Parmar and others v. Ram Babu Agarwal and others
Judgment dated 29.07.2009 passed by the High Court in F.A. No. 263 of 2004, reported in 2009 (3) MPLJ 628

Held:

From the facts and pleadings of the defendant as well as oral and documentary evidence on record, it is clear that the temple is situated over the suit premises and in the temple there are idols of deities like Hanumanji, Shivji, Parvatiji, Ganeshji, Nadiyaji and Bharonji. The defendant did not pled any evidence that when the deities had been installed in the place. It is also a fact

that Seth Prahlad Das created a public trust in the year 1908 and the property of bada had been given to the public trust and thereafter the trust sold the property in favour of Balkishan and Prahlad Das and the defendant purchased the plot from Balkishan vide registered sale deed 11.7.1978, Ex. P/5. In the aforesaid sale deed it has been mentioned that over one portion of the land, an idol of Hanumanji is situated. From the aforesaid documents, Ex. P/5, which has been admitted by the defendant, it is clear that at the time of sale of property, an idol of Hanumanji was there. Balkishan had purchased the land from trust-defendant No. 3 and the trust was created by Seth Prahlad Das in the year 1908. There is no evidence on record that the trust installed any idol or the idol of Hanumanji, hence, it is to be presumed that the idol of Hanumanji and other deities have been in the place before the year 1908. In such circumstances, the evidence produced by the plaintiffs and the pleadings pleaded in the plaint that there is a temple of Hanumanji for the last 100 years is correct. When it has been established from the document and oral evidence that the deities haven been in place for a quite long time, then the burden was on the defendant to show that when the deities were installed by a private person. The onus of an issue in a civil case is not permanently fixed but is constantly fluctuating. The Hon'ble Supreme Court in the case of *Kundan Lal Rallaram v. Custodian, Evacuee Property,* reported in *AIR 1961 SC 1316 (V 48 C 241),* has held as under with regard to "burden of proof": –

> "The phrase "burden of proof" has two meanings — One, the burden of proof as a matter of law and pleading and the other the burden of establishing a case; the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact."

The Hon'ble Supreme Court further in the case of *Anil Rishi v. Gurbaksh Singh,* reported *in AIR 2006 SC 1971,* has held as under with regard to burden of proof: –

> "The initial burden of proof would be on the plaintiff in view of Section 101. The elementary rule Section 101 is inflexible. In terms of section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same. Under Section 111 when one party stands to other in a position of active confidence

> the burden providing good faith would be on the party who is in a position of active confidence. But before such a finding is arrived at, the averments as regard alleged fiduciary relationship must be established before a presumption of undue influence against a person in position of active confidence is drawn. The factum of active confidence should also be established."

From the above principle of law, it is clear that initially the plaintiffs have discharged their burden to prove that there is a temple situated as mentioned in the plaint for last 100 years and if any person has constructed the temple as a private temple or installed deities, then the burden was on the defendants to prove the same. The defendants have failed to prove to discharge the burden, hence, it has to be held that there is a temple for the last 100 years of Hanumanji and other deities like Shivji, Parvatiji, Ganeshji, Nadiyaji and Bharonji.

The next question is that whether it is a public temple or a private temple. It is an admitted fact that the temple of the deities are situated in an open place and there is also an open space. Near the place, there are two rooms. Earlier, Mr. Ishwari Prasad and his family members had been residing in the rooms. He was a pujari of the temple. The fact is clear from the written statement filed by Radhabai in the Civil Suit instituted by Rambabu Agarwal, defendant No. 1 with regard to eviction against Radhabai, Laxman Prasad and Ishwari Prasad. It has been mentioned in the aforesaid written statement that Ishwari Prasad had been working in the temple as pujari and after a compromise the defendant No. 1 got the possession of the temple along with two rooms. The Court also appointed a Commissioner Mr. Dilip Avasthi, who in his report mentioned that there is a temple of Hanumanji and two banyan trees are in the place. He also prepared a map and in the aforesaid map a temple and 10 ft passage has also been shown between two parts of the houses.

From the evidence, it is clear that at the time of creation of public trust by Seth Prahlad Das, the temple was a part and parcel of the property of Seth Prahlad Das and after creation of trust, it became a part and parcel of the trust. The defendant No. 1himself admitted that he purchased the property from public trust, hence, admittedly, the temple was of the ownership of the public trust. A Constitution Bench of the Hon'ble Supreme Court in the case of *Tilkayat Shri Govindlalji Maharaj etc. v. State of Rajasthan and others, reported in AIR 1963 SC 1638,* has held as under with regard to fact that whether a Hindu temple is private or public.

> "19. The practical modes of worship adopted by members of this cult bring out the same effect. Lord Krishna as a child is the main object of worship. His worship consists of several acts of performance every day in the prescribed order of ceremonies. These begin with the ringing of the

bell in the morning and putting the Lord to bed at night. After the Lord is awakened by the ringing of the bell, there is a blowing of the conch-shell, awakening of the Lord and offering morning refreshments, waving of lamps; bathing; dressing; food; leading the cows our for grazing; the midday meal; waiving of lamps again; the evening service; meticulous care from day to day constitute the prescribed items of Seva which the devotees attend every day in the Vallabh Temple. In order to be able to offer Bhakti in a proper way, the members of this denomination are initiated into this cult by the performance of two rites, one is Sharana Mantropadesh and the other is Atma Nivedan. The first gives the devotee the status of a Vaishnava and the second confers upon him the status of an Adhikari entitled to pursue the path of service or devotion. At the performance of the first rite, the mantra which is repeated in the ears of the devotee is "Shree Krishna Sharanam Mamah" and on the occasion a 'Tulsi Kanthi' is put around the neck of the devotee. At the second initiation, a religious formula is repeated, the effect of which is that the devotee treats himself and all his properties as belonging to Lord Krishna. We have already referred to the original image which Vallabha installed in the temple built in his time and the seven idols which Vithalnathji gave to his sons. These idols are technically described as 'Nidhi Swaroops'. Besides these idols, there are several other idols which are worshipped by Vaishnava devotees after they are sanctified by the Guru. It is thus clear that believing in the paramount importance and efficacy of Bhakti, the followers of Vallabha attend the worship and services of the Nidhi Swaroops or idols from day to day in the belief that such devotional conduct would ultimately lead to their salvation."

The Hon'ble Supreme Court further in the case of *Gedela Satchidananda Murthy (Dead) by LRs. v. Dy. Commissioner, Endowments Deptt., A.P. and others, (2007) 5 SCC 677,* quoting the earlier judgments has held as under with regard to public character of a religious place:-

> "20. It was, therefore, clearly not a case where shastraic basis was held to be the sine qua non for the purpose of arriving at a decision that the institution in question would fall within the purview of the terms "religious and charitable institution" or not.

21. In *Dhaneshwarbuwa Guru Prusushottambuwa v. Charity Commr.*, this Court opined that while each case of endowment as to the character of temple would depend on the history, traditional and facts, the presence of the features enumerated therein may be held to be sufficient to hold that the same satisfied the tests which were required to be fulfilled in arriving at a decision that the temple in question was a public trust.

22. We are not, however, oblivious of the fact that only became members of the public are freely admitted to the temple, that by itself would not be sufficient to come to the conclusion that the temple was a public institution.

23. In *Hari Bhanu Maharaj v. Charity Commr. Upon* which again the learned counsel relied, the question as to whether the members of the public had visited the mandir as invitees and nothing more was held to be dependent upon the facts and circumstances of each case.

24. In view of the fact that members of the public could visit the temple only on payment of some amount is itself indicative of the fact that they could do so as of right. It has been found as of fact that there used to be regular visitors in the temple. They would not only pay their obeisance to the great men who had been buried there but also offer pujas at the temple. It has also been found as of fact that various types of pujas were being performed by the public at the temple on payment. Pamphlets had been issued by the plaintiffs themselves for the aforementioned purpose. The said pamphlets were marked as Exts. B-7 and B-8."

The Hon'ble Supreme Court further in the case of *A.A. Gopalakrishnan v. Cochin Devaswom Board and others,* reported in *(2007) 7 SCC 482,* has held as under with regard to protection and safeguarding of properties of deities and temple:-

"10. The properties of deities, temples and Davaswom Boards, require to be protected and safeguarded by their trustees/achakas/shebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned.

> Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/ trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of Courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

Learned Single Judge of this Court in case of *Idol Ganeshji Maharaj and others v. J.M. Anand and another* reported in *1983 JLJ 248,* has held as under after relying on the judgment of the Hon'ble Supreme Court, that the temple or property dedicated to the temple could not be transferred by Shebait or any other person for pecuniary consideration:-

> "The transfer of Shebaitship would mean a delegation of duties of the transferor and says Mukherjee, it would contravene the very policy of the Law. Of late, the Supreme Court, in *Kali Kinkar Ganguly v. Panna Banerjee, AIR 1974 SC 1932,* at page 1936, paragraph 25, has laid down that "neither a temple nor the deities nor the Shebaiti right can be transferred by sale for pecuniary consideration. It has been further observed that such transfer by sale is void in its inception." The property dedicated to the services of an idol is, as a rule, inalienable. But exceptions to this rule have been recognized in the interest of the deity itself."

From the above principle of law laid down by the Hon'ble Supreme Court and evidence on record of the case, it is clear that the temple is in place for the last 100 years. It was a part of public trust and subsequently, without mentioning the facts, the land has been sold to the defendant No. 1 by the trust. From the evidence on record, it is clear that number of persons had been worshipping the deities, in such circumstances, it is a public temple.

From the evidence on record, it is also clear that the temple is situated over area of 5 ft x 5 ft and there is also an open place, i.e., chabutara. Apart from this, the worshippers have a right to worship in the temple by using a passage and as per the principles of law laid down by the learned Single Judge, relying on the judgment of the Hon'ble Supreme Court, the temple could not be sold, hence, the trust had no right to sell the temple to the defendant No.1, neither the defendant No.1 has a right to raise any construction over the area of temple. Upto that extent, the suit filed by the plaintiffs is liable to be decreed. The trial Court has committed an error of law in holding that the plaintiffs have failed to prove that there is a public temple and there is an open place adjoining to the temple and the public trust had no right to sell the aforesaid place.

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414. INDIAN PENAL CODE, 1860 – Sections 24, 25, 415, 420, 463, 464, 467 and 471

Mere execution of a sale deed by claiming that property being sold was executant's property does not amount to commission of offence under Section 467 (forgery of a document purporting to be a valuable security) and Section 471 (using of forged document as genuine) of IPC, even if title to property does not vest in the executant because unless a false document, as defined in Section 464 IPC is made, no forgery can be committed as defined in Section 463 IPC.

Sale of property by a person knowing that it is not his property, purchaser is entitled to prosecute the seller under Section 415/420 of IPC but a third party (even original owner of the property) cannot do so.

Fraud is neither defined nor has been made an offence under IPC – However, certain specified acts when done fraudulently constitute offence.

Mohammed Ibrahim and others v. State of Bihar and another

Judgment dated 04.09.2009 passed by the Supreme Court in Criminal Appeal No. 1695 of 2009, reported in (2009) 8 SCC 751

Held:

Let us first consider whether the complaint averments even assuming to be true make out the ingredients of the offences punishable either under Section 467 or Section 471 of the Penal Code.

Section 467 (in so far as it is relevant to this case) provides that whoever forges a document which purports to be a valuable security, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Section 471, relevant to our purpose, provides that whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

Section 470 defines a forged document as a false document made by forgery. The term "forgery" used in these two sections is defined in Section 463. *Whoever makes any false documents* with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into express or implied contract, or with intent to commit fraud or that the fraud may be committed, commits forgery.

The condition precedent for an offence under Sections 467 and 471 is forgery. The condition precedent for forgery is making a false document (or false electronic record or part thereof). This case does not relate to any false electronic record. Therefore, the question is whether the first accused, in executing and registering the two sale deeds purporting to sell a property (even if it is assumed that it did not belong to him), can be said to have made and executed false documents, in collusion with the other accused.

Section 464 defines "making a false document".

An analysis of Section 464 of the Penal Code shows that it divides false documents into three categories:

1. The first is where a person dishonestly or fraudulently makes or executes a document with the intention of causing it to be believed that such document was made or executed by some other person, or by the authority of some other person, by whom or by whose authority he knows it was not made or executed.
2. The second is where a person dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part, without lawful authority, after it has been made or executed by either himself of any other person.
3. The third is where a person dishonestly or fraudulently, causes any person to sign, execute or alter a document knowing that such person could not by reason of (a) unsoundness of mind; or (b) intoxication; or (c) deception practiced upon him, know the contents of the document or the nature of alteration.

It short, a person is said to have made a "false document", if (i) he made or executed a document claiming to be someone else or authorized by someone else; or (ii) he altered or tampered a document; or (iii) he obtained a document by practicing deception, or from a person not in control of his senses.

The sale deeds executed by the first appellant, clearly and obviously do not fall under the second and third categories of "false documents". It therefore, remains to be seen whether the claim of the complainant that the execution of sale deeds by the first accused, who was in no way connected with the land, amounted to committing forgery of the documents with the intention of taking possession of the complainant's land (and that Accused 2 to 5 as the purchaser, witness, scribe and stamp vendor, colluded with the first accused in execution and registration of the said sale deeds), would bring the case under the first category.

There is a fundamental difference between a person executing a sale deed claiming that the property conveyed is his property, and person executing a sale deed by impersonating the owner or falsely claiming to be authorized or empowered by the owner, to execute the deed on owner's behalf. When a person executes a document conveying a property describing it as his, there are two possibilities. The first is that he bona fide believes that a property actually belongs to him. The second is that he may be dishonestly or fraudulently claiming it to be his even though he knows that it is not his property. But to fall under first category of "false documents", it is not sufficient that a document has been made or executed dishonestly or fraudulently. There is a further requirement that it should have been made with the intention of causing it to be believed that

such document was made or executed by, or by the authority of a person, by whom or by whose authority he knows that it was not made or executed.

When a document is executed by a person claiming a property which is not his, he is not claiming that he is someone else nor is he claiming that he is authorised by someone else. Therefore, execution of such document (purporting to convey some property of which he is not the owner) is not execution of a false document as defined under Section 464 of the Code. If what is executed is not a false document, there is no forgery. If there is no forgery, then neither Section 467 nor Section 471 of the Code are attracted.

Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:

(i) Deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;

(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

To constitute an offence under Section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived:

(i) to deliver any property to any person, or

(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).

When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with the sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused.

It is not the case of the complainant that any of the accused *tried to deceive him* either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale

deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner.

As the ingredients of cheating as stated in Section 415 are not found, it cannot be said that there was an offence punishable under Sections 417, 418, 419 or 420 of the Code.

When we say that execution of a sale deed by a person, purporting to convey a property which is not his, as his property, is not making a false document and therefore, not forgery, we should not be understood as holding that such an act can never by a criminal offence. If a person sells a property knowing that it does not belong to him, and thereby defrauds the person who purchased the property, the person defrauded, that is, the purchase, may complain that the vendor committed the fraudulent act of cheating. But a third party who is not the purchaser under the deed may not be able to make such complaint.

The term "fraud" is not defined in the Code. The dictionary definition of "fraud" is "deliberate deception, treachery or cheating intended to gain advantage". Section 17 of the Contract Act, 1872 defines "fraud" with reference to a party to a contract.

In *Vimla (Dr.) v. Delhi Admn. AIR 1963 SC 1572,* this Court explained the meaning of the expression "defraud" thus: (AIR pp. 1576-77, para 14)

> "14. ...the expression 'defraud' involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied."

The above definition was in essence reiterated in *State of U.P. v. Ranjit Singh, (1999) 2 SCC 617.*

The Penal Code however, defines 'dishonesty' in Section 24 and 'fraudulently' in Section 25. To defraud or do something fraudulently is not by itself made an offence under the Penal Code, but various acts when done fraudulently (or fraudulently and dishonestly) are made offences. These include Sections 206, 207, 208, 210, 239, 240, 242, 243, 246 to 253, 255 to 261, 264 to 266, 415 to 420, 421, 422, 423, 424, 463 to 471, 474, 477 and 496. It follows

therefore that by merely alleging or showing that a person acted fraudulently, it cannot be assumed that he committed an offence punishable under the Code or any other law, unless that fraudulent act is specified to be an offence under the Code or other law.

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415. INDIAN PENAL CODE, 1860 – Section 34

Common intention – Section 34 of IPC, application of.

For invoking application of Section 34 of the IPC, prosecution is required to establish common intention of all the accused participated in the incident and their action in furtherance of the common intention – Specific, overt act by the individual accused is not necessary.

Vijay Singh and others v. State of M.P.

Judgment dated 07.07.2009 passed by the High Court in Criminal Appeal No. 968 of 2001, reported in 2009 (4) MPHT 306 (DB)

Held:

For invoking application of Section 34 of the IPC, prosecution is required to establish common intention of all the accused participated in the incident and their action in furtherance of the common intention. Specifically, overt act by the individual accused is not necessary, but if prosecution is able to establish that all the accused shared the common intention and in furtherance if anyone or all acted and committed crime, then all would be liable for the same. The common intention can also be developed on spot if convincing and reliable evidence is available. (See Supreme Court judgment passed in case of *State of Orissa v. Arjun Das, AIR 1999 SC 3229*)

In case of *Ramashish Yadav v. State of Bihar, (1999) 8 SCC 555,* the Supreme Court has observed thus: –

> "It requires a pre-arranged plan and pre-supposes prior concert, therefore, there must be prior meeting of mind. It can also be developed at the spur of moment but there must be prearrangement or pre-meditated concert."

Applying aforesaid guidelines in the instant case there is no sufficient and convincing evidence about pre-meeting of mind and pre-arranged plan among the accused persons. Deceased and eye-witness Hitendra Kumar (P.W.6) were just bypassing from the locality of appellants, and as they reached in front of the house of appellant Vishnu Singh, appellant Vishnu Singh alone stopped the deceased and abused him. At that juncture, other appellants also reached and appellant Gajju @ Gajendra took out knife from his pocket and gave blows causing injuries and only injury caused by him on left scapula region resulted into death of deceased. Appellant Vishnu Singh had used lathi and caused contused abrasions, simple injuries, which did not contribute in death of deceased. Looking to the number of injuries found on the person of deceased on various parts of the body, the overt act of appellants Vijaysingh and

Madhavsingh i.e. catching hold of the deceased is not acceptable. If these two accused caught hold of the deceased during the course of assault by appellant Vishnu Singh with lathi and appellant Gajju @ Gajendra with knife, the injuries found on the person of deceased could not be caused and blows given by appellants Vishnu Singh and Gajju @ Gajendra could also fell on the person of Vijay Singh and Madhav Singh. In this view of the matter, the appellant Vishnu Singh would be liable for his individual act causing simple injuries by *lathi* and appellant Gajju @ Gajendra would be liable for causing injuries by knife (choori), out of which, injury on left scapula region proved fatal, which damaged the heart and ventricle of the deceased.

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***416. INDIAN PENAL CODE, 1860 – Sections 96 & 97**

PROPERTY LAW:

Settled possession of trespasser and right of private defence of a person or property – Explained.

The four attributes of settled possession which may entitle a trespasser to exercise the right of private defence of property and person, which are referred to in *Puran Singh v. State of Punjab, (1975) 4 SCC 518* are as under :

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment and which contains an element of *animus possidendi.* The nature of possession of the trespasser would however be a matter to be decided on facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced in by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence and the true owner will have no right of private defence.

These four attributes ought to read conjunctively and not disjunctively.

The right of private defence of person or property is to be exercised under the following limitations:

(i) that if there is sufficient time for recourse to the public authorities the right is not available;

(ii) that more harm than necessary should not be caused;
(iii) that there must be a reasonable apprehension of death or of grievous hurt to the person or damage to the property concerned. *[See Puran Singh (supra) and Rame Gowda v. M. Varadappa Naidu, (2004) 1 SCC 769 and Bhanwar Singh v. State of M.P., (2008) 16 SCC 657BI]*

Ram Pat and others v. State of Haryana

Judgment dated 12.05.2009 passed by the Supreme Court in Criminal Appeal No. 581 of 2007, reported in (2009) 7 SCC 614

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417. INDIAN PENAL CODE, 1860 – Sections 107 & 306

Abetment of suicide – Proof – Due to humiliation and insult caused by appellant/accused deceased committed suicide – Appellant had illicit relationship with wife of deceased and claimed to maintain their relation and took wife of deceased at her instance from house in the presence of close relatives of deceased – Proximity and nexus between suicide of deceased and conduct or behaviour of accused and wife of the deceased established – Conviction upheld.

Dammu Sreenu v. State of Andhra Pradesh

Judgment dated 28.05.2009 passed by the Supreme Court in Criminal Appeal No. 681 of 2003, reported in AIR 2009 SC 2532

Held:

The facts which are disclosed from the evidence on record clearly establish that Accused No. 1 had illicit relationship with Accused No. 2 who is the wife of the deceased. It is also not in dispute that Accused No. 1 was visiting the house of the deceased to meet Accused No. 2 and that he even went to the house of deceased when he came to know that the wife of the deceased was sent with her father for counselling and advise. He loudly stated that he would continue to have relationship with Accused No. 2 and would come to her house so long she does not object to the same. He also took her away from the house of PW-5, her brother and kept her with him for 4 days. Immediately after the said incident the deceased committed the suicide. Therefore, there is definitely a proximity and nexus between the conduct and behaviour of Accused No. 1 and Accused No. 2 with that of the suicide committed by the deceased. Besides, there is clear and unambiguous findings of fact of three courts that the appellant is guilty of the offence under Section 306 of IPC. Such findings do not call for any interference in our hand. This Court also does not generally embark upon reappreciation of evidence on facts which are found and held against the appellant.

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418. INDIAN PENAL CODE, 1860 – Sections 120-B, 302/34, 394 & 412
CRIMINAL PROCEDURE CODE, 1973 – Sections 211 to 215 & 464

(i) In a case of criminal conspiracy, there ought to be two or more persons who must be parties to an agreement and it is trite to say that one person alone can never be held guilty for criminal conspiracy for the simple reason that one cannot conspire with oneself.

(ii) Omission/error in framing of charge – Held, unless there is failure of justice and accused has been prejudiced, no interference would be required – Case law reiterated.

Sanichar Sahni v. State of Bihar

Judgment dated 26.05.2009 passed by the Supreme Court in Criminal Appeal No. 772 of 2008, reported in (2009) 7 SCC 198

Held:

At the time of framing of the charge on 21-11-2002, the appellant was charged only under Section 120-B IPC alone and the co-accused Munilal Shani was charged under Section 302/34, 394 and 412 IPC and Section 27 Arms Act. Accused Bishwanath Sahni was charged under Sections 302/34 IPC. None of the co-accused was charged for conspiracy under Section 120-B IPC. The appellant was not charged with any other offence except under Section 120-B IPC though the specific case of the prosecution was that the appellant hatched the criminal conspiracy with his father and brother to eliminate Bhola Chaudhary.

On conclusion of the trial, the appellant was convicted vide judgment and under date 30-05-2003 under Section 120-B IPC and was sentenced to undergo rigorous imprisonment for life. Accused Bishwanath Shani was convicted under Sections 302/34 IPC and sentenced to RI for life. Accused Munilal Sahni was convicted under Sections 302, 394 and 412 IPC and sentenced to undergo RI for life under Section 302, RI for seven years under Section 394 and RI for three years under Section 412 IPC. He was further convicted under Section 27 of the Arms Act and sentenced to undergo RI for one year. Being aggrieved, all the convicted persons including the present appellant filed appeal which has been decided by the impugned judgment and order dated 13-12-2007 by which the High Court acquitted Bishwanath Sahni, giving benefit of doubt. Appeal of the present appellant and Munilal Sahni was dismissed Munilal Sahni challenged the judgment and order of the High Court and his special leave petition has been dismissed by this Court. Hence, the present appeal by appellant Sanichar Sahni.

Learned counsel for the appellant has placed reliance upon the judgment of this Court in *Topandas v. State of Bombay, AIR 1956 SC 33* wherein it has been held that in a case of conspiracy there ought to be two or more persons who must be parties to an agreement and it is trite to say that one person alone can never be held guilty for criminal conspiracy for the simple reason that one cannot conspire with oneself. However, in the said case four persons where charged for having committed the offence under Section 120-B IPC and out of them

three were acquitted of the charges, remaining one could not be convicted to be guilty of the offence of criminal conspiracy.

Same view has been reiterated in *Fakhruddin v. State of M.P., AIR 1967 SC 1326* wherein this Court held that the offence of conspiracy cannot survive the acquittal of the alleged co-conspirators. In that case also if the other co-accused were to be acquitted of all the charges, this Court held that the appellant Fakhruddin could not be convicted unless there was a proof that he had conspired with person or persons other than his co-accused.

Both the abovereferred cases had been where all the co-accused had been acquitted of the charges of conspiracy. Thus the said cases referred to and relied upon by the learned counsel for the appellant are of no assistance as the facts involved in the instant case are quite distinguishable. At the most it can be held that the charge had not been framed properly.

It is also not the case where the appellant can take the plea that he was not aware as to what was the charge against him and what defence he could lead. There had been evidence of hatching the conspiracy of impeccable character. On the point of conspiracy the courts below have recorded the finding against the appellant.

In *State of A.P. v. Thakkidiram Reddy, (1998) 6 SCC 554,* this Court considered the issue of not framing the proper charges. In that case averment had been raised that charges have not been framed against the accused persons in accordance with Section 211 CrPC. In that case the charge had been framed under Section 148 IPC, though it was alleged that they were the members of an unlawful assembly, it was not mentioned what its common object was. Besides, it was contended, a charge under Section 302 IPC simpliciter was framed against all the accused persons and not with the aid of Section 149 IPC for which they were convicted by the trial court.

This Court repealed the contention observing as under: [*Thakkidiram case* (supra), SCC p. 558, para 10]

> "10. Sub-section (1) of Section 464 of the Code of Criminal Procedure 1973 ('the Code', for short) expressly provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the court of appeal, confirmation or revision, a failure of justice has *in fact* been occasioned thereby. Sub- section (2) of the said section lays down the procedure that the court of appeal, confirmation or revision has to follow in case it is of the opinion that a failure of justice has in fact been occasioned. The other section relevant for our purposes is Section 465 of the Code; and it lays down that no finding, sentence or

order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the proceedings, unless in the opinion of that court, a failure of justice has in fact been occasioned. It further provides, inter alia, that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

The court in *Thakkidiram case* (supra) further held that in judging a question of prejudice, as of guilt, the court must act with a broad vision and look to the substance and not to technicalities, and its main concern should be to see whether the accused had a fair trail, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. In the said case this court ultimately came to the conclusion that in spite of defect in framing of charge, as no prejudice had been caused to the convicts, no interference was required.

A Constitution Bench of this Court in *Willie (William) Slaney v. State of M.P., AIR 1956 SC 116* considered the issue of non-framing of charges properly and conviction of an accused for the offences for which he has not been charged and reached the conclusion as under: (AIR p. 137, para 86-87)

> "86.... In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out...."
>
> "87.... If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established."

This Court in *Gurpreet Singh v. State of Punjab, (2005) 12 SCC 615* referred to and relied upon its earlier judgments in *Willie (William) Slaney case* (supra) and *Thakkidiram Reddy* (supra) and held that unless there is failure of justice and thereby the cause of the accused has been prejudiced, no interference is required if the conviction can be upheld on the evidence led against the accused. The Court should not interfere unless it is established that the accused persons were in any way prejudiced due to the errors and omissions in framing the charges against him. A similar view has been reiterated by this Court in *Ramji Singh v. State of Bihar, (2001) 9 SCC 528.*

Therefore, the law on the issue can be summarized to the effect that unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory.

In the instant case learned counsel for the appellant, could not point out as to what prejudice has been caused to the appellant. Charge has been framed against the appellant under Section 120-B IPC. He never raised any grievance against the same at the time of framing of the charge or during the course of the trial or by filling any petition for quashing the charge. The issue was not agitated before the High Court also.

Thus, in view of the above, we do not find any force in this appeal. The appeal is accordingly dismissed.

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419. INDIAN PENAL CODE, 1860 – Sections 300, 302 & 498-A
EVIDENCE ACT, 1872 – Section 3

(i) Offence of murder – Conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the Supreme Court – Case law restated.

(ii) Accused husband allegedly committed murder of deceased – Death took place within one year and four months of marriage – Dead body was found in matrimonial home of deceased – Injuries on the dead body were noticed the by witnesses – Conduct of the accused, in absconding after the incident, is an unculpating circumstance – As per the autopsy examination, the death was due to asphyxia resulting from throttling – Conviction is proper.

Krishna Ghosh v. State of West Bengal

Judgment dated 31.03.2009 passed by the Supreme Court in Criminal Appeal No. 597 of 2009, reported in AIR 2009 SC 2279

Held:

There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

In *Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh, AIR 1952 SC 343,* wherein it was observed thus:

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of

the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622.* Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These aspects were highlighted in *State of Rajasthan v. Raja Ram (2003) 8 SCC 180, State of Haryana v. Jagbir Singh and Anr. (2003) 11 SCC 261, Kusuma Ankama Rao v. State of A.P. (Criminal Appeal No. 185/2005 disposed of on 7.7.2008) and Manivel and Ors. v. State of Tami Nadu (Criminal Appeal No. 473 of 2001 disposed of on 8.8.2008*).

The evidence of PWs 1, 2, 4, 7, 8 and 14 clearly establish that the body was found in the matrimonial home of the deceased with injuries noticed by them which fit in with the evidence of the Autopsy Surgeon (PW-15). The evidence of PWs 2, 4, 7 and 8 throw considerable light on the controversy. The death took place within one year and four months of the marriage in the house of the accused persons and the dead body was found with injuries. At the relevant

time the accused persons were absconding which is of considerable importance. The plea of alibi set up by the present appellant has been discarded because there was no material to substantiate such plea. The trial Court and the High Court have analysed this aspect in great detail. From the evidence of PWs 2, 4, 7 and 8 it is seen that the accused persons were absconding since the date of incident when the dead body of the deceased lay in her matrimonial home. PW-14 the Investigating Officer's evidence was to that effect. The High Court has rightly noted that the conduct of the accused appellants before it had a striking feature in the absence of any reasonable explanation and is an inculpating circumstance against them. The injuries on the dead body were noticed by several witnesses e.g. PWs 1, 2, 4, 7 and 8. The autopsy examination on the dead body of the deceased revealed the following injuries:

> 1. Nail marks (illegible) in shape four in numbers over left side of the neck placed one below the other and extended laterally and other marks over the right side of the neck, aclymorsis over the front of the neck. On direction extravagation of the blood found in the muscles of the neck and fractures of the (illegible) cartilage found.
>
> 2. Multiple abrasion and aclynorsis of the varying sizes are seen over the back and different parts of the body both upper and lower (illegible).

According to the doctor the death was due to asphyxia resulting from throttling which was ante mortem and homicidal in nature.

Above being the position we find no merit in this appeal. Appeal against conviction and sentence dismissed.

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***420. INDIAN PENAL CODE, 1860 – Sections 300 Fourthly, 302 & 304 Part II**
Culpable homicide – Whether amounts to murder or not?
Immediately after the quarrel between the deceased and mother-in-law (appellant/accused living separately for many years) when deceased was returning home after fetching water, the appellant/accused came and threw a burning wick made of rags on the clothes of the deceased.
Since the deceased was wearing terylene clothes at the relevant point of time, it aggravated the fire which caused the burn injuries – The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicaemia which was the main cause of the death of the deceased after 8 days of the incident.
It is therefore, established that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased– Therefore, the case cannot be said to be covered under clause (4) of Section 300 IPC – It is covered under Section 304 Part II IPC.

Maniben v. State of Gujarat

Judgment dated 07.08.2009 passed by the Supreme Court in Criminal Appeal No. 658 of 2002, reported in (2009) 8 SCC 796

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421. INDIAN PENAL CODE, 1860 – Sections 307 & 149

Unlawful assembly – Appellant/accused along with other accused persons, on seeing mob, brought firearms from the house – Appellant fired in air only for the purpose of scaring away aggressors and to scatter them – Appellant/accused cannot be termed as a member of unlawful assembly.

Attempt to murder – Appellant/accused had not fired at the complainant – Exercising right of private defence, other accused fired – In such circumstances, appellant/accused cannot be even liable to be convicted for offence u/s 307 r/w/s 149.

Use of licensed gun for aforesaid purpose cannot be an offence u/s 27 of the Arms Act.

Deomuni Sharma v. State of Jharkhand

Judgment dated 26.05.2009 passed by the Supreme Court in Criminal Appeal No. 718 of 2003, reported in AIR 2009 SC 2731

Held:

We have very carefully seen the judgments of the Courts below. It is nowhere stated nor is it the case of any prosecution witness that the appellant had fired at Manoj Singh. It was only Bimal Kumar who had fired. Again, even the finding regarding the unlawful assembly cannot be sustained insofar as the present appellant is concerned. Seeing the mob, the appellant and the other accused persons entered in the house and came back with the fire arms and even then the appellant fired in the air which according to the High Court was only for the purpose of scaring away the aggressors and to scatter them. Till that moment at least the appellant cannot be a member of unlawful assembly nor can the assembly itself be termed as unlawful assembly with a definite common object. If ultimately the High Court has come to a conclusion that the other accused persons fired in pursuance of their right of private defence, then this act of theirs could not be said to be that attributable to an unlawful assembly. In the wake of the High Court's judgment the finding regarding Section 149, IPC must fail and with it the conviction for offence under Sections 147 and 148, IPC. Once that result is achieved, there is no question of convicting the appellant for the offence under Section 307, IPC which apparently has been committed

individually by Bimal Kumar alone by firing at Manoj Singh. It is also apparent that the offence under Section 304 Part I was committed by accused Nos. 3 and 4, Ajay Sharma and Bijay Sharma individually and substantially by themselves alone. It was not in pursuance of any object of the unlawful assembly because there was no unlawful assembly at all. Therefore, the present appellant cannot be even booked for offence under Section 307 read with Section 149, IPC. He must, therefore, be acquitted of that offence.

For inviting conviction under Section 27 of the Arms Act, it has to be proved that the fire arm has been used in contravention of Section 5 or Section 7 of the Arms Act. Since it was a licensed gun, there was no question of Section 7 coming in. Insofar as Section 5 is concerned, we do not think that an act on the part of the accused in firing in the air to scare the aggressors would come within the mischief of Section 5 (1) of the Arms Act. Therefore, the appellant is liable to be acquitted even of the offence under Section 27 of the Arms Act.

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422. INDIAN PENAL CODE, 1860 – Section 376 (2) (g)

Gang rape – Deeming fiction under Explanation to Section 376 (2) (g) – Cannot be applicable to make a woman guilty of committing rape as woman cannot have intention to commit such offence.

State of Rajasthan v. Hemraj & Anr.

Judgment dated 27.04.2009 passed by the Supreme Court in Criminal Appeal No. 847 of 2009, reported in AIR 2009 SC 2644

Held:

A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to "gang rape". The language of sub-section(2)(g) provides that "whoever commits 'gang rape' shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. "Common intention" denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an

element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from same intention or similar intention. The *sine qua non* for bringing in application of Section 34 IPC that the act must be done in furtherance of the common intention to do a criminal act. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape. A woman cannot be said to have an intention to commit rape. Therefore, the counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376(2)(g).

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423. INDIAN PENAL CODE, 1860 – Section 498-A
EVIDENCE ACT, 1872 – Sections 32 (1) & 6
Cruelty – Proof – Evidence in statement regarding what deceased told as to torture and harassment by the accused has no connection with any circumstance of transaction which resulted in her death – Said evidence is not admissible u/s 32 (1) as well as u/s 6 of the Evidence Act as such statement is not made under the circumstances required to be applicable to the rule of *res gestae*.

Bhairon Singh v. State of Madhya Pradesh

Judgment dated 29.05.2009 passed by the Supreme Court in Criminal Appeal No. 1124 of 2009, reported in AIR 2009 SC 2603

Held:

The only evidence to bring home charge under Section 498A, IPC, is that of PW-4 and PW-5. In their deposition PW-4 and PW-5 stated that their sister told them that accused was torturing her as he wanted that her brothers arrange a job for him or the house at Ganj Basoda is given to him or a cash of Rs.1 lac is given to enable him to do some business. They deposed that as and when their sister come to their house, she would tell them that accused used to insert cloth in her mouth and give beatings for dowry. The trial court as well as the High Court relied on the evidence of PW-4 and PW-5 and held that charge under Section 498A, IPC, against the accused was proved. Apart from the statement attributed to the deceased, none of the witnesses had spoken anything which they had seen directly insofar as torture and harassment to Ranjana Rani @ Raj Kumari was concerned.

The moot question is: whether the statements attributed to the deceased could be used as evidence for entering upon a finding that the accused subjected Ranjana Rani @ Raj Kumari to cruelty as contemplated under Section 498A, IPC. In our considered view, the evidence of PW-4 and PW-5 about what the deceased Ranjana Rani @ Raj Kumari had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the

statement of a dead person can be looked into in evidence. The statement of a dead person is admissible in law if the statement is as to the cause of death or as to any of the circumstance of the transactions which resulted in her death, in a case in which the cause of death comes into question. What has been deposed by PW-4 and PW-5 has no connection with any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of PW-4 and PW-5 is hardly an evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted.

We are fortified in our view by the decision of this Court in *Inder Pal v. State of M.P, (2001) 10 SCC 736,* wherein this Court considered the matter thus:

> "4. We will consider at first the contention as to whether there is any evidence against the appellant which can be used against him for entering upon a finding that he subjected Damyanti to cruelty as contemplated in Section 498-A IPC. PW 1 father of the deceased and PW 8 mother of the deceased have stated that Damyanti had complained to them of her plight in the house of her husband and particularly about the conduct of the appellant. PW 4 sister of the deceased and PW 5 a relative of the deceased have also spoken more or less on the same line. Exhibit P-7.and Exhibit P-8 are letters said to have been written by Damyanti. In those two letters reference has been made to her life in the house of her in-laws and in one of the letters she said that her husband had subjected her to beating.
>
> 5. Apart from the statement attributed to the deceased none of the witnesses had spoken of anything which they had seen directly. The question is whether the statements attributed to the deceased could be used as evidence in this case including the contents of Exhibits P-7 and P-8 (letters).
>
> 6. Before deciding that question we have to point out that the High Court came to a conclusion that the allegation that she committed suicide was not substantiated. A dying declaration was recorded by the Executive Magistrate in which the deceased had stated that she got burns accidentally from a stove. If that be so, death could not be the result of either any harassment or any cruelty which she was subjected to. In this context we may point out that the State has not challenged the finding of the High Court that death of Damyanti was not due to commission of suicide.

7. Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306 IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned."

The learned counsel for the State invited our attention to Section 6 of the Evidence Act. The rule embodied in Section 6 is usually known as the rule of res gestae. What it means is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. To form particular statement as part of the same transaction utterances must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after its occurrence. Section 6 of the Evidence Act, in the facts and circumstances of the case, insofar as admissibility of a statement of PW-4 and PW-5 about what the deceased had told them against the accused of the treatment meted out to her is concerned, is not at all attracted.

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424. INTEREST ACT, 1978 – Section 3
CIVIL PROCEDURE CODE, 1908 – Section 34
When there is no specific provision for grant of interest on any amount due, the Court or Tribunal can award interest in their discretion under Section 3 of Interest Act and Section 34 of the Civil Procedure Code.
Thazhathe Purayil Sarabi and others v. Union of India and another
Judgment dated 14.05.2009 passed by the Supreme Court in Civil Appeal No. 3658 of 2009, reported in (2009) 7 SCC 372

Held

The Courts are consistent in their view that normally when a money decree is passed, it is most essential that interst be granted for the period during which the money was due, but could not be utilized by the person in whose favour an order of recovery of money was passed.

As has been frequently explained by this Court and various High Courts, interest is essentially a compensation payable on account of denial of the right to utilize the money due, which has been, in fact, utilized by the person withholding the same. Accordingly, payment of interest follows as a matter of course when a money decree is passed.

The only question to be decided is since when is such interest payable on such a decree. Though, there are two divergent views, one indicating that interest is payable from the date when the claim for the principal sum is made, namely, the date of institution of the proceedings in the recovery of the amount, the other view is that such interest is payable only when a determination is made and order is passed for recovery of the dues. However, the more consistent view has been the former and in rare cases interest has been awarded for periods even prior to the institution of proceedings for recovery of the dues, where the same is provided for by the terms of the agreement entered into between the parties or where the same is permissible by statute.

This Court in *Jagdish Rai & Bros. V. Union of India, (1999) 3 SCC 257* went on to observe that the courts have taken a view that the award of interest under Section 34 of the Civil Procedure Code is a matter of procedure and ought to be granted in all cases where there is a decree for money unless there are strong reasons to decline the same. In the said case, this Court modified the decree of the Court of the Subordinate Judge by including a direction for payment of interest @ 12% per annum from the date when the award was made the decree of the Court of the Subordinate Judge, till realisation.

As we have indicated earlier, payment of interest is basically compensation for being denied the use of the money during the period in which the same could have been made available to the claimants. In our view, both the Tribunal, as also the High Court, were wrong in not granting any interest whatsoever to the appellants, except by way of a default clause, which is contrary to the established principles relating to payment of interest on money claims.

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425. LAND ACQUISITION ACT, 1894 – Sections 4, 23 (1-A), 23 (2), 28 & 34

(i) Compensation under Land Acquisition Act is based on the full value of property as on the date of notification under Section 4 (1) of the Act.

(ii) Section 23 (1-A) was introduced to mitigate the hardship caused to the owner of the land – It is neither interest nor solatium – It is an additional compensation assigned to compensate owner of the land, for the rise in price during the pendency of the Land Acquisition proceedings and has to be reckoned as part of the market value of the land.

(iii) Payment of additional amount under Section 23 (1-A) and award of solatium under Section 23 (2) are mandatory.

(iv) Interest is different from compensation – Interest under Section 28 of the Act is part of the amount of compensation whereas interest under Section 34 is only for delay in making the payment.

(v) Benefit under Section 28-A is available in respect of the entire compensation.

Commissioner of Income Tax, Faridabad v. Ghanshyam (HUF)
Judgment dated 16.07.2009 passed by the Supreme Court in Civil Appeal No. 4401 of 2009, reported in (2009) 8 SCC 412

Held:

Section 23 (1-A) was introduced in the Land Acquisition Act, 1894 to mitigate the hardship caused to the owner of the land who is deprived of its enjoyment by taking possession from him and using it for public purpose, because of considerable delay in making the award and offering payment thereof [See: *Assistant Commissioner v. Mathapathi Basavannewwa and others, AIR 1995 SC 2492*]. To obviate such hardship, Section 23(1-A) was introduced and the Legislature envisaged that the owner is entitled to 12% per annum additional amount on the market value for a period commencing on or from the date of publication of the notification under Section 4(1) of the 1894 Act upto the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

The additional amount payable under Section 23(1-A) of the 1894 Act is neither interest nor solatium. It is an additional compensation designed to compensate the owner of the land, for the rise in price during the pendency of the land acquisition proceedings. It is a measure to offset the effect of inflation and the continuous rise in the value of properties. [See: *State of Tamil Nadu v. L. Krishnan, AIR 1996 SC 497*]. Therefore, the amount payable under Section 23(1-A) of the 1894 Act is an additional compensation in respect to the acquisition and has to be reckoned as part of the market value of the land.

Sub-section (1-A) of Section 23 was introduced by Land Acquisition (Amendment) Act, 1984. It provides that in every case the Court shall award an amount as additional compensation at the rate of 12% per annum on the market value of the land for the period commencing on and from the date of publication of the notification under Section 4(1) to the date of the award of the Collector or to the date of taking possession of the land, whichever is earlier. In other words sub-section (1-A) of Section 23 provides for additional compensation. The said sub-section takes care of increase in the value at the rate of 12% per annum.

In addition to the market value of the land, as provided above, the Court shall in every case award a sum of 30% on such market value, in consideration of the compulsory nature of acquisition. This is under Section 23(2) of the 1894 Act. In short, Section 23(2) talks about solatium. Award of solatium is mandatory. Similarly, payment of additional amount under Section 23 (1-A) is mandatory.

The award of interest under Section 28 of the 1894 Act is discretionary. Section 28 applies when the amount originally awarded has been paid or deposited and when the Court awards excess amount. In such cases interest on that excess alone is payable. Section 28 empowers the Court to award interest on the excess amount of compensation awarded by it over the amount awarded by the Collector. The compensation awarded by the Court includes the additional compensation awarded under Section 23 (1-A) and the solatium under Section 23(2) of the said Act. This award of interest is not mandatory but is left to the discretion of the Court.

Section 28 is applicable only in respect of the excess amount, which is determined by the Court after a reference under Section 18 of the 1894 Act. Section 28 does not apply to cases of undue delay in making award for compensation [See: *Ram Chand v. Union of India, (1994) 1 SCC 44*]. In *Shree Vijay Cotton & Oil Mills Ltd. v. State of Gujarat, (1991) 1 SCC 262,* this Court has held that interest is different from compensation.

To sum up, interest is different from compensation. However, interest paid on the excess amount under Section 28 of the 1894 Act depends upon a claim by the person whose land is acquired whereas interest under Section 34 is for delay in making payment. This vital difference needs to be kept in mind in deciding this matter. Interest under Section 28 is part of the amount of compensation whereas interest under Section 34 is only for delay in making payment after the compensation amount is determined. Interest under Section 28 is a part of enhanced value of the land which is not the case in the matter of payment of interest under Section 34.

It is clear from reading of Sections 23(1-A), 23(2) as also Section 28 of the 1894 Act that additional benefits are available on the market value of the acquired lands under Section 23(1-A) and 23(2) whereas Section 28 is available in respect of the entire compensation.

It was held by the Constitution Bench of the Supreme Court in *Sunder v. Union of India, (2001) 7 SCC 211,* that

> "indeed the language of Section 28 does not even remotely refer to market value alone and in terms it talks of compensation or the sum equivalent thereto. Thus, interest awardable under Section 28, would include within its ambit both the market value and the statutory solatium. It would be thus evident that even the provisions of Section 28 authorise the grant of interest on solatium as well."

Thus solatium means an integral part of compensation, interest would be payable on it. Section 34 postulates award of interest at 9% per annum from the date of taking possession only until it is paid or deposited. It is a mandatory provision. Basically Section 34 provides for payment of interest for delayed payment.

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426. LAND ACQUISITION ACT, 1894 – Section 23

Acquisition of land – Compensation, determination of – Large tract of land abutting to National Highway – Such land deserves valuation at per acre basis and would fetch higher value in comparison to small tract of land – Area adjacent to road, capable of being used for commercial purpose as well as for residential purpose would fetch higher value as compared to the land situated beyond 100 metres from the road.

Hira Devi and others v. State of M.P. and another

Judgment dated 11.12.2008 passed by the High Court in First Appeal No. 600 of 2001, reported in 2009 (3) MPLJ 544 (DB)

Held:

It is not in dispute that the land is abutting to the National High Way No. 12. But, at the same time this is large tract of the land. In front of the area in question on the other side of the road talkies, residential houses and shops have come up, thus, the area adjacent to the road was capable of being used for the commercial purpose, rest of the area could have been used at the time of issuance of notification for residential purpose considering the potentiality as on the date of issuance of notification under section 4 of the Act. We are not taking into consideration the subsequent user to which the land has been put, due to acquisition, but, the potential value on the date of notification as laid down by the Apex Court in *LAO Karnataka Housing Board v. P.N. Malappa, AIR 1997 SC 3661.* The price has to be offered applying the test of a prudent buyer as laid down by the Apex Court in *Special Duty Collector v. K. Sambasiv Rao, AIR 1997 SC 2625. In Basant Kumar v. Union of India, (1996) 11 SCC 542* in case of acquisition of developing land 60% deduction towards development was held permissible considering the facts of the said case. If the land is developed less deduction can be made. At the same time situation of the land is relevant criteria if the land is situated abutting the road it may fetch higher value, higher compensation is permissible to the land adjacent to the road a enunciated by the Apex Court in *Priya Vrat v. Union of India, AIR 1995 SC 2471.* In *B. Rameshan v. State of Kerala, AIR 1997 SC 2159,* offer of two different price abutting road and the land which was low lying areas was upheld. Similarly, acquisition of the plot where it is small or large is relevant factor, nearness to road where land is in frontage or only small opening on front, proximity to developed area, depressed portion requiring filling, shape, level etc. are relevant considerations as observed by the Apex Court in *Chimanlal Hargovinddas v. LAO, Poona, AIR 1988 SC 1652.* In *Land Acquisition Officer and Sub-Collector, Gadwal v. Smt. Sreelatha Bhoopal and anr, AIR 1997 SC 2552* the Apex Court has laid down that sale-deed of small piece of land cannot be taken into consideration for the purpose of determination of the compensation for the large tract of the land. The Apex Court in *Gafar and ors v. Moradabad Development Authority and anr, (2007) 7 SCC 614* has observed that the burden of proof is upon the claimants to establish that amount awarded to them by the Land Acquisition Officer is not adequate. In the instant case, as

the area is large tract of the land 25.66 acres and sale-deeds from P/1 to P/10 indicates that the land was being sold @ Rs. 2 to 5 per square feet, but, we cannot adopt the same method for the purpose of determination of value for the large tract of the land. Area in question is 25.66 acres at the same time some area is adjacent to the road that would fetch higher value as compared to the land situated beyond 100 metres from the road. In the instant case, initially the award was proposed by the Land Acquisition Officer @ Rs. 23770/- per acre, that was not accepted for the reason best known to the authorities. At the rate of Rs. 2/- per square feet the appellant has claimed that the compensation would come to Rs. 22 lakh for which they have come up in the appeal, but, we are not accepting the claim based on the sale deeds Ex.P/1 to P/10, which is average worked out on the basis of sale-deeds Ex.P/1 to P/10. per acre price at Rs. 2 per sq. feet comes approximately to Rs. 86,000/- on the basis of sale-deed evidence. However, we are not accepting the aforesaid as area in question is large tract. Though we are adopting two different tracts for 100 metres we are awarding higher compensation as compared to the land situated beyond 100 metres of the Highway. It would still be appropriate to value the land at Rs. 30,000/- per acre for land situated within 100 metres area abutting the road and beyond 100 metres we deem it appropriate to assess the compensation at Rs. 25,000/- per acre. In large tract of the land certain area is required to be deducted for the purpose of development and then large tract of land would not fetch same value as that of small plots. We have come to the aforesaid valuation at per acre basis, calculating in terms of per square feet it would come between 52-60 paise per square feet. Though we have awarded compensation per acre basis, not on per square feet basis, but, we have made the aforesaid calculation only in order to satisfy ourselves that the compensation awarded is reasonable one not on higher side. Interest shall be paid on the solatium and other component mentioned in section 23 of the Act as per decision of the Apex Court in *Sunder v. Union of India, (2001) 7 SCC 211,* interest shall be worked out in terms of section 28 in the light of the aforesaid decision. Accordingly, the compensation shall be worked out by the Reference Court. We make it clear that area of 5.85 acre is beyond 100 metres that would carry valuation @ Rs. 25,000/- per acre and remaining area within 100 metres from road as found by Reference Court is 19.81 acre shall carry valuation @ 30,000/- per acre.

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***427. MOTOR VEHICLES ACT, 1988 – Sections 147 & 149**
INSURANCE ACT, 1938
Insurance policy – When becomes effective? There is a specific column to mention period of insurance from ..... to ..... at the bottom of the Insurance policy where period of insurance is mentioned as from 01.12.1989 to 30.11.1990 without specifying the time – In the absence of any such proof, any mention in the space for the period of insurance, the time i.e. 1:10 p.m. mentioned by the officer, who accepted the proposal for marking purpose, cannot be construed as

time for commencement of insurance policy – Thus, the insurance policy would become effective from midnight on 01.12.1989.

Oriental Insurance Company Ltd. v. Suresh Kumar Nema & Ors.

Judgment dated 24.03.2009 passed by the High Court in Miscellaneous Appeal No. 1087 of 1996, reported in AIR 2009 MP 191

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428. MOTOR VEHICLES ACT, 1988 – Sections 147 & 149

Liability incurred by the Insurance Company, nature and scope of – Policy of insurance is a contract between the insurer and insured to indemnify the insured from the liability which will be fastened upon the latter on account of the accident resulting from the use of his motor vehicle – Liability of the indemnifier to indemnify would arise only if the same is fastened upon the insured –Therefore, in case of negligence on the part of the offending motor vehicle, the liability of compensation shall have to be fastened alongwith the Insurance Company on the owner also and consequently the Insurance Company alone cannot be made liable to make payment of compensation.

Vimlabai and others v. Sharif Khan and others

Judgment dated 24.8.2009 passed by the High Court in Miscellaneous Appeal No. 915 of 2004, reported in 2009 (4) MPHT 425 (FB)

Held:

Precise questions involved herein are (i) whether the owner of the offending vehicle may be exonerated from the liability of the compensation and; (ii) whether the Insurance Company alone may be fastened with the liability of compensation.

Liability of owner of the offending motor vehicle to compensate the victim in a motor accident due to negligent driving of the offending vehicle is based on the Law of Torts. Compulsory insurance in respect of the third party risk is introduced in the Indian Law by introducing Chapter VIII in the Motor Vehicles Act, 1939. In the Motor Vehicles Act, 1988, Chapter XI is incorporated for the same purpose. In the earlier Act, Section 95 provided the requirement of policy and limits of liability in order to comply with the requirements of Chapter VIII (of Motor Vehicles Act, 1939). While dealing with the situation, the Supreme Court of India in the case of *Minu B. Mehta and another v. Balkrishna Ramchandra Nayan and another, AIR 1977 SC 1248,* observed:-

> "Under Section 95 (1) (b) (i) of the Act, it is required that policy of insurance must be a policy which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. It may be noted that what is intended by the policy of insurance is insuring a person against any liability which may be incurred by him.

> The insurance policy is only to cover the liability of a person which he might have incurred in respect of a death or bodily injury. The accident to which the owner or the person insuring is liable is to the extent of his liability in respect of death or bodily injury and that of death or bodily injury and that liability is covered by the insurance. It is, therefore, obvious that if the owner has not incurred any liability in respect of death or bodily injury to any person there is no liability and it is not intended to be covered by the insurance. The liability contemplated arises under the law of negligence and under the principle of vicarious liability. The provisions as they stand do not make the owner or the Insurance Company liable for any bodily injury caused to a third party arising out of the use of the vehicle unless the liability can be fastened on him. It is significant to note that under sub-clause (ii) of Section 95 (1) (b) of the Act, the policy of insurance must insure a person against the death or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. Under Section 95 (1) (b) clause (ii) of the Act the liability of the person arises when bodily injury to any passenger is caused by or use of the vehicle in a public place. So far as the bodily injury caused to a passenger is concerned it need not be due to any act or liability incurred by the person. It may be noted that the provisions of Section 95 are similar to Section 36 (1) of the English Road Traffic Act, 1930, the relevant portion of which is to the effect that a policy of insurance must be policy which insures a person in respect of any liability which may be incurred by him in respect of death or bodily injury to any persons caused by or arising out of the use of the vehicle on road. The expression "liability which may be incurred by him" is meant as covering any liability arising out of the use of the vehicle. It will thus be seen that the person must be under a liability and that liability alone is covered by the insurance policy."

Policy of insurance is a contract between the insurer and insured to indemnify the insured from the liability which will be fastened upon the latter on account of the accident resulting from the use of his motor vehicle. Sections 124 and 125 of the Indian Contract Act, 1872 may be reproduced hereinbelow for convenience:-

> **124. "Contract of indemnity" defined. –** A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity.

125. Rights of indemnity-holder when sued. – The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor –

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

Perusal of the aforesaid goes to show that the liability of the indemnifier to indemnify would arise only if the same is fastened upon the person who has to be indemnified. If no liability is fastened upon such person, there would be no occasion to indemnify him. Thus, it may, indeed, be concluded that in case of negligence on the part of the offending motor vehicle, the liability of compensation shall have to be fastened alongwith the Insurance Company on the owner also and consequently the Insurance Company alone cannot be made liable to make payment of compensation.

While dealing with the liability of owner and driver, the Supreme Court of India in a recent case of *Machindranath Kernath Kasar v. D.S. Mylarappa, AIR 2008 SC 2545* has observed:-

> "When a damage is caused upon act of negligence on the part of a person, the said person is primarily held to be liable for payment of damages. The owner of the vehicle would be liable as he has permitted the use thereof. To that effect only under the Motor Vehicles Act, both driver and owner would be jointly liable."

In a more recent case of *Samundra Devi and others v. Narendra Kaur and others, 2009 (2) JLJ 161 (SC),* the Apex Court has further clearly observed:-

> "A contract of insurance as is well known is a contract of indemnity. In a case of accident, the primary liability under law for payment of compensation is that of the driver. The owner of the vehicle also becomes vicariously liable therefore. In case involving a third party to the contract of

insurance in terms of Section 147 of the Motor Vehicles Act, 1988 providing for a compulsory insurance, the insurer becomes statutorily liable to indemnify the owner. Indisputably, the Insurance Company would be liable to indemnify the insured in respect of loss suffered by a third party or in respect of damages of property."

Hon'ble Supreme Court of India in the case of *Oriental Insurance Co. Ltd. v. Sunita Rathi, AIR 1998 SC 257,* has already observed:-

> "It follows that the insurer cannot be held liable on the basis of the above policy in the present case and, therefore, the liability has to be of the owner of the vehicle. However, we find that the High Court, without assigning any reason, has simply assumed that the owner of the vehicle was not liable and that the insurer alone was liable in the present case. This conclusion, reached by the High Court is clearly erroneous. The liability of the insurer arises only when the liability of the insured has been upheld for the purpose of indemnifying the insured under the contract of insurance. There is, thus, a basic fallacy in the conclusion reached by the High Court on the point."

We may also successfully refer to the decision of High Court of *Karnataka in the case of United India Insurance Co. Ltd. v. S. Sidheswara and another, 2001 ACJ 1621,* wherein it is clearly held that once the owner himself is not found liable, making the claim against the Insurance Company does not arise.

No contrary view could be pointed out during the hearing.

Ex consequenti, Question of Law No. 1 is answered that Chapter XI of the Motor Vehicles Act, 1988 does not empower the Tribunal or Court to fasten the liability of compensation on the Insurance Company alone. Question of Law No. 2 is also answered that the liability for payment of compensation is to be necessarily fastened on respondent Nos. 2 and 3 in joint and several manner, due to valid policy of insurance in favour of the respondent No. 2.

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***429. MOTOR VEHICLES ACT, 1988 – Sections 147, 149 (2) (a) (ii), 168 & 169**

(i) In a motor accident claim case, the driver of the offending bus was not possessing a valid driving licence – Hence, primary liability to pay the awarded amount was of the driver and owner of the bus but the Insurance Company was directed to deposit the amount and liability to recover the same from driver and owner of the bus.

(ii) For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the Executing Court as if the dispute between the insurer

and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.

Whenever a direction has been issued by the Tribunal in this regard, it must be held to have been done in exercise of its inherent power.

New India Assurance Company Limited v. Kusum and others

Judgment dated 04.08.2009 passed by the Supreme Court in Civil Appeal No. 5082 of 2009, reported in (2009) 8 SCC 377

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430. MOTOR VEHICLES ACT, 1988 – Sections 166 & 168

Compensation – Death of a student having a brilliant career and had an offer of employment from a U.S. based company – Income of the deceased determined by applying lower multiplier – Position explained.

Oriental Insurance Co. Ltd. v. Deo Patodi & Ors.

Judgment dated 12.05.2009 passed by the Supreme Court in Civil Appeal No. 3482 of 2009, reported in AIR 2009 SC 2442

Held:

The question in regard to the calculation of loss of dependency, it is trite, would vary from case to case.

The fact that the deceased was a brilliant student is not in dispute. He had graduated in Business Administration in U.K. Even as a student, in a job on a part-time basis he was being paid a salary of Rs. 80,000 per month (UK £1008.31). He paid his income-tax even in U.K.

After his graduation, he came back to India. He was offered a job as EU Controller by GOA LLC, a company based in Chicago, USA at an annual salary of Rs. 18 lakhs (i.e. $ 41,600). However, when the accident took place he was not working; having not accepted the said offer. He was still a student. It would have been hazardous for the Tribunal to calculate the amount of compensation towards the loss of dependency on that basis.

The Tribunal and the High Court, however, in our opinion, keeping in view the aforementioned backdrop might not be correct in holding that he would have earned only Rs. 18,000 per month. It is true that the cost of living in the western countries would be higher. The standard of living in the western countries cannot be followed; in the absence of any material placed before this Court it should not be followed in India. Even in a case where the victim of an accident was earning salary in U.S. Dollars, this Court opined that a lower multiplier should be applied.

In *United India Insurance Co. Ltd. & Ors. v. Patricia Jean Mahajan & Ors., (2002) 6 SCC 281,* this Court held:

"19. In the present case we find that the parents of the deceased were 69/73 years. Two daughters were aged 17 and 19 years. The main question, which strikes us in this case is that in the given circumstances the amount of multiplicand also assumes relevance. The total amount of dependency as found by the learned Single Judge and also rightly upheld by the Division Bench comes to 2,26,297 dollars. Applying multiplier of 10, the amount with interest and the conversion rate of Rs. 47, comes to Rs. 10.38 crores and with multiplier of 13 at the conversion rate of Rs. 30 the amount comes to Rs. 16.12 crores with interest. These amounts are huge indeed. Looking to the Indian economy, fiscal and financial situation, the amount is certainly a fabulous amount though in the background of American conditions it may not be so. Therefore, where there is so much of disparity in the economic conditions and affluence of the two places viz. the place to which the victim belongs and the place where the compensation is to be paid, a golden balance must be struck somewhere, to arrive at a reasonable and fair mesne. Looking by the Indian standards they may not be much too overcompensated and similarly not very much undercompensated as well, in the background of the country where most of the dependent beneficiaries reside. Two of the dependants, namely, parents aged 69/ 73 years live in India, but four of them are in the United States. Shri Soli J. Sorabjee submitted that the amount of multiplicand shall surely be relevant and in case it is a high amount, a lower multiplier can appropriately be applied. We find force in this submission....

20. The court cannot be totally oblivious to the realities. The Second Schedule while prescribing the multiplier, had maximum income of Rs. 40,000 p.a. in mind, but it is considered to be a safe guide for applying the prescribed multiplier in cases of higher income also but in cases where the gap in income is so wide as in the present case income is 2,26,297 dollars, in such a situation, it cannot be said that some deviation in the multiplier would be impermissible. Therefore, a deviation from applying the multiplier as provided in the Second Schedule may have to be made in this case. Apart from factors indicated earlier the amount of multiplicand also becomes a factor to be taken into account which in this case comes to 2,26,297 dollars, that is to say an amount of around Rs. 68 lakhs per annum by converting it at the rate of Rs. 30. By Indian standards it is

certainly a high amount. Therefore, for the purposes of fair compensation, a lesser multiplier can be applied to a heavy amount of multiplicand."

The said decision, however, to some extent was clarified by this Court in *Punjab National Bank v. Indian Bank & Anr, (2003) 6 SCC 79.*

It is in the aforementioned situation, we are of the opinion that the fair amount of compensation should have been calculated at Rs. 25,000 per month being about 1/3rd of the amount which he was receiving in U.K.

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431. MOTOR VEHICLES ACT, 1988 – Sections 168 & 163-A

Death of children – Determination of quantum of compensation – Pecuniary and non-pecuniary damages as well as claim with regard to future prospects to be considered.

Pecuniary loss calculated as per structured formula, provided in Second Schedule, is justified.

Non-pecuniary damage, on account of loss of happiness, pain and suffering and expectation of life etc., is also admissible to the dependant of the deceased.

Compensation towards future prospects is also necessary as denial of the same would be unjustified.

R.K. Malik & Anr.v. Kiran Pal & Ors.

Judgment dated 15.05.2009 passed by the Supreme Court in Civil Appeal No. 3608 of 2009, reported in AIR 2009 SC 2506

Held:

So far as the pecuniary damage is concerned we are of the considered view both the Tribunal as well as the High Court has awarded the compensation on the basis of Second Schedule and relevant multiplier under the Act. However, we may notice here that as far as non-pecuniary damages are concerned, the Tribunal does not award any compensation under the head of non-pecuniary damages. However, in appeal the High Court has elaborately discussed this aspect of the matter and has awarded non-pecuniary damages of Rs. 75,000. Needless to say, pecuniary damages seeks to compensate those losses which can be translated into money terms like loss of earnings, actual and prospective earning and other out of pocket expenses. In contrast, non-pecuniary damages include such immeasurable elements as pain and suffering and loss of amenity and enjoyment of life. In this context, it becomes duty of the court to award just compensation for non-pecuniary loss. As already noted it is difficult to quantify the non-pecuniary compensation, nevertheless, the endeavour of the Court must be to provide a just, fair and reasonable amount as compensation keeping in view all relevant facts and circumstances into consideration. We have noticed that the High Court in present case has enhanced the compensation in this category by Rs. 75,000 in all connected appeals. We do not find any infirmity in that regard.

In view of discussion made hereinbefore, it is quite clear the claim with regard to future prospect should have been be addressed by the courts below. While considering such claims, child's performance in school, the reputation of the school etc. might be taken into consideration. In the present case, records shows that the children were good in studies and studying in a reasonably good school. Naturally, their future prospect would be presumed to be good and bright. Since they were children, there is no yardstick to measure the loss of future prospects of these children. But as already noted, they were performing well in studies, natural consequence supposed to be a bright future. In the case of *Lata Wadhwa and others v. State of Bihar and others, AIR 2001 SC 3218 and M. S. Grewal v. Deep Chand Sood, (2001) 8 SCC 151,* the Supreme Court recognised such future prospect as basis and factor to be considered. Therefore, denying compensation towards future prospects seems to be unjustified. Keeping this in background, facts and circumstances of the present case, and following the decision in *Lata Wadhwa* (supra) and *M. S. Grewal* (supra), we deem it appropriate to grant compensation of Rs. 75,000 (which is roughly half of the amount given on account of pecuniary damages) as compensation for the future prospects of the children, to be paid to each claimant within one month of the date of this decision. We would like to clarify that this amount i.e. Rs. 75,000 is over and above what has been awarded by the High Court.

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***432. MOTOR VEHICLES ACT, 1988 – Sections 168 & 173**
EMPLOYEES' STATE INSURANCE ACT, 1948 – Section 53
When an insured person or his dependants are entitled to receive or recover an amount of damages or compensation under the Employees' State Insurance Act, the remedy under Motor Vehicles Act to receive or recover compensation is barred u/s 53 of the E.S.I. Act – It is clear by bare reading of the provisions of Section 53 of the Act, which reads as under:

> **"53. Bar against receiving or recovery of compensation or damages under any other law – An insured person or his dependants shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under the Act."**

National Insurance Co. Ltd. v. Hamida Khatoon & Ors.
Judgment dated 06.05.2009 passed by the Supreme Court in Civil Appeal No. 3324 of 2009, reported in AIR 2009 SC 2599

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433. N.D.P.S. ACT, 1985 – Sections 41, 42 (1) & (2)

The provisions under Sections 42 (1) & (2) are not mandatory but discretionary only to check the misuse of NDPS Act rather than providing an escape to the hardened drug peddlers.

The requirement of Sections 42 (1) and 42 (2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer – But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure.

Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case – While total non-compliance with requirements of Sections 42 (1) and (2) is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42.

The non-compliance with Section 42 may not vitiate the trial if it does not cause any prejudice to the accused – Also effect of conflicting precedents in the cases of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513* and *Sajjan Abraham v. State of Kerala, (2001) 6 SCC 692* explained.

Karnail Singh v. State of Haryana

Judgment dated 29.07.2009 passed by the Supreme Court in Criminal Appeal No. 36 of 2003, reported in (2009) 8 SCC 539 (5-Judge Bench)

Held:

In *Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513,* a three-Judge Bench of this Court held that compliance of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act") is mandatory and failure to take down the information in writing and forthwith send a report to his immediate official superior would cause prejudice to the accused. In the case of *Sajan Abraham v. State of Kerala, (2001) 6 SCC 692,* which was also decided by a three-Judge Bench, it was held that Section 42 was not mandatory and substantial compliance was sufficient.

The ratio in *Abdul Rashid* (supra) is that the non-recording of vital information collected by the police at the first instance can be counted as a circumstance in favour of the accused-appellant. The police officer examined as a crucial witness, PW2, in that case admitted that he proceeded to the spot only on getting information that somebody was trying to transport a narcotic substance, but failed to take down the information in writing. Nor did he apprise his superior officer of any such information either then or later, much less send a copy of the information to the superior officer. Thus, it was a case of absolute non-compliance with the requirements of Section 42(1) and (2).

It is clear from *Sajan Abraham* (supra) that to enforce the law under the NDPS Act stringently against the persons involved in illicit drug trafficking and drug abuse, the legislature has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted to be mandatory. It is further clear that this is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The court however while construing such provisions strictly should not interpret them literally so as to render their compliance impossible. It concluded that if in a case, the strict following of a mandate results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. It is also clear that when substantial compliance has been made it would not vitiate the prosecution case.

A careful examination of the facts in *Abdul Rashid* (supra) and *Sajan Abraham* (supra) shows that the decisions revolved on the facts and do not really lay down different prepositions of law. In *Abdul Rashid* (supra), there was total non-compliance with the provision of section 42. The police officer neither took down the information as required under section 42(1) nor informed his immediate official superior, as required by Section 42(2). It is in that context this Court expressed the view that it was imperative that the police officer should take down the information and forthwith send a copy thereof to his immediate superior officer and the action of the police officer on the basis of the unrecorded information would become suspect though the trial may not be vitiated on that score alone. On the other hand, in *Sajan Abraham* (supra), the facts were different. In that case, it was very difficult, if not impossible for the Sub- Inspector of police to record in writing the information given by PW-3 and send a copy thereof forthwith to his official superior, as the information was given to him when he was on patrol duty while he was moving in a jeep and unless he acted on the information immediately, the accused would have escaped. The Sub-Inspector of Police therefore acted, without recording the information into writing, but however, sent a copy of the FIR along with other records regarding arrest of the accused immediately to his superior officer. It is in these circumstances that this Court held that the omission to record in writing the information received was not a violation of Section 42.

Under Section 42 (2) as it stood prior to the amendment, such empowered officer who takes down any information in writing or records the grounds under the proviso to Section 42 (1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance with this provision the same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay, whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance with which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to the immediate official superior and not to any other condition of the section.

Abdul Rashid (supra) has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policy makers about it. Now for the last two decades police investigation has gone through a sea- change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the Register/Records kept for those purposes in the police station or the respective offices of the authorized officials in the Act if the emergency of the situation so requires. As a result, if the statutory provisions under Section 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/ offenders as a major ground for acquittal. Consequently, these provisions should be taken as discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug-peddlers.

In conclusion, what is to be noticed is Abdul Rashid (supra) did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham* (supra) hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information (of the nature referred to in Sub-section (1) of section 42) from any person had to record it in writing in the Register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to

him, in such a situation, he could take action as per clauses (a) to (d) of section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42 (1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance of requirements of sub-sections (1) and (2) of section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance of section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending a copy of such information to the official superior forthwith, may not be treated as violation of section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of section 42 of the Act. Whether there is adequate or substantial compliance with section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to section 42 by Act 9 of 2001.

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434. PREVENTION OF CRUELTY TO ANIMALS ACT, 1960 – Sections 11 (1) (a), (b), (c) and 11 (2)
GOVANSH VADH PRATISHEDH ADHINIYAM, 2004 – Sections 3, 4, 6, 7 & 9
CRIMINAL PROCEDURE CODE, 1973 – Sections 457 & 451
20 cattle, allegedly being transported for slaughtering purposes, were seized with respect to offences under Sections 11 (1) (a), (b), (c) and (2) of Prevention of Cruelty to Animals Act, 1960 and under Sections

3, 4 and 9 of M.P. Govansh Vadh Pratishedh Adhiniyam, 2004 – The Magistrate ordered the cattle be given in Supurdgi (custody) to the charitable institution Goshala – While allowing the revision petition, the Revisional Court directed the Goshala to hand over the custody of animals to the accused persons, who claimed that they had purchased those cattle – Held, the M.P. Agricultural Cattle Preservation Act, 1959, Prevention of Cruelty to Animals Act, 1960 and M.P. Govansh Vadh Pratishedh Adhiniyam, 2004 have been enacted in pursuance of the Directive Principle contained in Article 48 of the Constitution of India with the object to prohibit slaughtering of cow progeny in the interest of general public and to maintain communal harmony and peace – The State Government is bound u/s 7 of the M.P. Govansh Vadh Pratishedh Adhiniyam, 2004 to take necessary steps for strengthening of institutions which are engaged in welfare activities of cow progeny – Keeping in view the above mentioned objects of the enactments, the order of the Magistrate to deliver the seized cattle in supurdgi to the Goshala was upheld with directions that the health report and photograph of each of the cattle along with the account of expenses spent in maintaining cattle would be submitted by the supurdgidar Goshala before the court concerned.

Secretary, Gopal Goshala Jhonkar v. Ramesh and others

Judgment dated 28.11.2008 passed by the High Court in Criminal Revision No. 658 of 2006, reported in 2009 (4) MPHT 182

Held:

Short facts of the case are that the respondent No. 4 registered a case against the respondent Nos. 1 to 3 under Section 11 (1) (a), (b), (c) and (2) of Prevention of Cruelty to Animals Act, 1960 and under Sections 3, 4 and 9 of M.P. Govansh Vadh Pratishedh Adhiniyam, 2004, on the ground that on 14.01.2006 at about 10:15 p.m. it was found that 20 cattle were being transported in a truck bearing registration No. MP 13-E/1148, cruelly for slaughtering purposes. Case of prosecution was that the driver of the truck who was transporting the cattle ran away, hence the animals and the truck was seized and after investigation the criminal case was registered against the respondent Nos. 1 to 3 for the offence punishable under the Act mentioned hereinabove. In the said criminal case an application was filed by the petitioner Gopal Goshala, through Secretary, wherein it was prayed that the animals be given to the petitioner on Supurdgi.

Vide order dated 18.01.2006 learned JMFC allowed the application filed by the petitioner holding that the criminal case will take time in its disposal and till then there is no arrangement for cattle food, therefore, animals be given in the custody of petitioner institute in Supurdgi. Thereafter the accused persons respondents Nos. 1 to 3 herein moved an application for recalling of the order dated 18.01.2006 and to give the custody of the cattle to them alleging that the animals were purchased by them, therefore, the custody be given to them. This

application was dismissed by the learned Judicial Magistrate, against which a criminal revision was filed by the accused respondents before the District & Sessions Court, which was allowed vide order dated 24.02.2006 and the order of dismissal of application dated 30.01.2006 was set aside with a further direction the learned Judicial Magistrate to pass an appropriate order on the application filed by the accused respondents under Section 457 CrPC keeping in view the law laid down by this Court in that regard.

Being aggrieved by the order passed by the Sessions Court, whereby the case was remanded for disposal of the application of the accused person for giving the animals in their custody a further revision was filed by the petitioner before this Court which was dismissed vide order dated 17.04.2006 and the order dated 24.02.2006 passed by learned Sessions Court was maintained, whereby the case was remanded to the learned Judicial Magistrate for disposal of the application. In compliance of the order passed by Sessions Court vide order dated 24.02.2006, which was confirmed by this Court vide order dated 17.04.2006, learned Judicial Magistrate disposed of the application vide order dated 26.05.2006, whereby the application filed by the accused respondents for giving the animals in their custody was dismissed, against which a revision petition was filed by the accused persons before the learned Revisional Court. By the impugned order date 04.07.2006 learned Revisional Court allowed the revision petition with a direction to the petitioner to hand over the custody of animals upon furnishing adequate security/Supurdginama, it is this order which is under challenge before this Court.

In the present case, custody of the cattle were given to the petitioner on Supurdgi, who has not claimed any right of ownership over the property at the time of taking them in Supurdgi. As a rule, it is not necessary to hear the Supurdigar in whose custody the property has been given, because the Supurdgidar is having no interest in the property and also given an undertaking to keep the article given in custody present as and when directed by the Court.

In the matter of *Gomukhi Sewa Dham v. State of Chhattisgarh reported in 2005 (1) MPHT 1 (CG),* where the allegations against the accused was that the cattle were taken to the State of Bihar for slaughtering, the same were handed over to Gomukhi Sewa Dham and upon the application by the accused for the custody of cattle, Chhattisgarh High Court has held that the accused persons have preferential right to have custody of cattle during pendency of trial.

In the mater of *Nabbu v. State of M.P., reported in 2005 (3) MPHT 348,* where the prosecution was under the Prevention of Madhya Pradesh Krashak Pashu Parirakshan Adhiniyam, 1959 and Prevention of Cruelty to Animals Laws Repealing Act, cattle were seized from the possession of accused and the allegation was that the cattle were being transported for slaughtering purposes which is prohibited under the law and the application for interim custody of seized cattle was refused, this Court observed as under: –

(a) That the seized cattle would be given to the applicant on his furnishing a Supurdnama to the satisfaction of the Trial Court.

(b) The value of the cattle shall be ascertained by the Trial Court and according to the valuation the applicant would be required to furnish the solvents surety to the satisfaction of the Trial Court and this surety would be given by a local resident of the concerned district.

(c) The applicant shall not remove those cattle beyond the jurisdiction of the Police State, Dhanora or Keolari, District Seoni.

(d) The applicant shall be bound to submit weekly report relating to all cattle before the Trial Court.

(e) During pendency of the trial the applicant would not be entitled to transfer the cattle in any manner.

In the matter of *Dayodaya Pashusewa Kendra, Sagar v. Islamuddin, reported in SLP (Criminal) No. 2238/01,* vide order dated *12.04.2002,* Hon'ble Apex Court has observed as under: –

> The Trial Court passed the impugned orders as to custody of property pending trial in favour of the appellants. The accused-respondents preferred revision petitions in the High Court. The High Court has allowed the revisions and set aside the orders of Trial Court without issuing any notice to the appellants herein, in favour of whom the Trial Court had passed the orders for custody of the property, that is, the animals. The appellants are vitally interested in the preservation and custody of animals. More so, when the orders of the Trial Court were in favour of the appellants, the High Court ought not have interfered with the orders of the Trial Court without giving notice to the appellants. The impugned orders of the High Court are vitiated and suffer from jurisdictional error.

In the matter of *State of U.P. v. Mustakeem,* passed *in Criminal Appeal No. 283-287/2002,* vide order dated 22.02.2002, Hon'ble Apex Court has observed as under: –

> The State of Uttar is in appeal against the direction of the Court directing release of the animals in favour of the owner. It is alleged that while those animals were registered for alleged violation of the provisions of Prevention of Cruelty to Animals Act, 1960, and the specific allegation in the FIR was that the animals were transported for being slaughtered, and the animals were tied very tightly to each other. The

criminal case is still pending. On an appeal for getting the custody of the animals was filed, the impugned order has been passed. We are shocked as to how such an order could be passed by the learned Judge of the High Court in view of the very allegations and in view of the charges, which the accused may face in the criminal trial. We, therefore, set aside the impugned order and direct that these animals be kept in the Goshala and the State Government undertakes to take the entire responsibility of the preservation of those animals so long as the mater is under trial.

Article 48 of the Constitution of India, which finds place in Chapter IV lays down that: –

> "The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and claves and other milch and draught cattle."

It is in pursuance to this article of directive principle that Acts like the Madhya Pradesh Agricultural Cattle Preservation Act, 1959 and M.P. Govansh Vadh Pratishedh Adhiniyam, 2004. Prevention of Cruelty to Animals Act, 1960 etc. has came into force. The object of the Act is to provide in the interest of general public and to maintain communal harmony and peace, for prohibition of slaughter of cow progeny and for matters connected therewith.

As per Section 7 of the Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004, the State Government is bound to take necessary steps for strengthening of institutions which are engaged in welfare activities of cow progeny.

Legally speaking, the position of petitioner in law is that of a bailee. Recourse therefore can be taken to Section 170 of the Indian Contract Act, 1972 lays down Bailee's particular lien which reads as follows: —

> "Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them."

The section is nothing but expression of common law principle that if man has an article delivered to him, on the improvement of which, he has to bestow trouble and expenses, he has a right to detain it until his demand is paid.

It is true that petitioner is an institution in whose custody the cattle were given in Supurdgi and having no other right title or interest in the property except to preserve, but since it was the live property herein, which were given in custody

to the petitioner institution which is a charitable institution, and dependents upon the donations made by persons having philanthropic attitude in life, has incurred expenses. It goes without saying that reimbursement of those expenses has to be made to that institution.

In the facts and circumstances of the case, petition is disposed of with the following directions: –

(1) Petitioner institution shall appear before the learned Court below on 15.12.2008 and shall submit the health report of each of the cattle along with photographs, which were given in Supurdgi to the petitioner.

(2) Petitioner institution shall also furnish the account of expenses spent in maintaining the cattle which were given in custody.

(3) Learned Trial Court shall dispose of the Criminal Case filed against the accused on merit, within a period of three months and shall also decide the entitlement of the accused persons to get back the cattle which were seized from their custody finally. At that time learned Court below shall also pass an appropriate order regarding reimbursement of expenses incurred by the petitioner institution in maintaining the cattle.

(4) In case learned Court below finds it difficult to dispose of the Criminal Case itself finally on merits within the time stipulated by this Court, then the learned Court below shall decide the application and at that time shall also keep in to consideration the financial status of the accused respondent Nos. 1 to 3 relating to maintenance of the cattle by them.

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435. REGISTRATION ACT, 1908 – Sections 17 & 49
TRANSFER OF PROPERTY ACT, 1882 – Section 54

(i) Purpose and benefit of registration of conveyance of immovable property to safety and transparency with reference to free hold properties explained.

(ii) Sale/purchase of immovable properties through sale agreement (SA), General Power of Attorney (GPA) and "Will" instead of registered conveyance deed deprecated and its whole ill effect highlighted.

Suraj Lamp and Industries Private Limited through Director v. State of Haryana and another

Judgment dated 15.05.2009 passed by the Supreme Court in CC No. 5804 of 2009, reported in (2009) 7 SCC 363

Held:

The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs.100 and upwards to or in immovable property.

Section 49 of the said Act provides that no document required by section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affecting such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person(s) presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified.

The matter involves an issue whose seriousness is underestimated. The issue to be addressed is avoidance of execution and registration of deeds of conveyance as the mode of transfer of freehold immovable property by increasing tendency to adopt 'Power of Attorney Sales', that is execution of sale agreement/ general power of attorney/will (for short 'SA/GPA/Will transactions') instead of execution and registration of regular deeds of conveyance, on receiving full consideration. This method adopted has the following variants:

(i) Execution of an agreement of sale, one or two powers of attorney, with or without a will, all unregistered.

(ii) Execution of an agreement of sale, power(s) of attorney and will, registering either all of them, or any two of them, or any one of them.

Recourse to "SG/GPA/will" transaction is taken in regard to freehold properties, even when there is no bar or prohibition regarding transfer or conveyance of such property by the following categories of persons:

(a) Vendors with imperfect title who cannot or do not want to execute registered deeds of conveyance.

(b) Purchasers who want to invest undisclosed wealth/income in immovable properties without any public record of the transactions. The process enables them to hold any number of properties without disclosing them as assets held.

(c) Purchasers who want to avoid the payment of stamp duty and registration charges either deliberately or on wrong advice. Persons who deal in real estate resort to these methods to avoid multiple stamp duties/registration fees so as to increase their profit margin.

Whatever be the intention, the consequences of SA/GPA/will transactions are disturbing and far-reaching, adversely affecting the economy, civil society and law and order. Firstly, it enables large-scale evasion of income tax, wealth tax, stamp duty and registration fees thereby denying the benefit of such revenue to the Government and the public. Secondly, such transactions enable persons with undisclosed wealth/income to invest their black money and also earn profit/income, thereby encouraging circulation of black money and corruption.

These kinds of transactions have disastrous collateral effects also. For example, when the market value increases, many vendors (who effected power of attorney sales without registration) are tempted to resell the property taking advantage of the fact that there is no registered instrument or record in any public office thereby cheating the purchaser. When the purchaser under such "power of attorney sales" comes to know about the vendor's action, he invariably tries to take the help of musclemen to "sort out" the issue and protect his rights. On the other hand, real estate mafia many a time purchase properties which are already subject to power of attorney sale and then threaten the previous "power of attorney sale" purchasers from asserting their rights. Either way, such power of attorney sales indirectly lead to growth of real estate mafia and criminalisation of real estate transactions.

Some States have made some efforts to control such "power of attorney sales" by subjecting agreements of sale involving delivery of possession and irrevocable powers of attorney for consideration to the same stamp duty as deeds of conveyance or by making such documents compulsorily registrable. But the steps taken are neither adequate nor properly implemented resulting in multiple transactions in regard to the same property by greedy and unscrupulous

vendors and/or purchasers giving nightmares to bona fide purchases intending to buy a property with certainty regarding title. It also makes it difficult for lawyers in tracing and certifying title.

Any process which interferes with regular transfers under deeds of conveyance properly stamped, registered and recorded in the registers of the Registration Department, is to be discouraged and deprecated.

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***436. SERVICE LAW:**

Absorption of employees declared surplus in another department – Seniority of the employees, determination of – Seniority shall be counted not from the date of their initial appointment but from the date of their assimilation in the new department.

State of M.P. v. K.M. Mishra & Ors.

Judgment dated 21.07.2009 passed by the High Court in W.A. No. 724 of 2008, reported in 2009 (III) MPJR 338 (DB)

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***437. SERVICE LAW:**

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966 – Rules 15 (1) & (2)

Departmental enquiry – Inordinate delay in initiation and completion without proper explanation – May be fatal keeping in view the entire circumstances of the case.

Prafulla Kumar v. State of M.P. and another

Judgment dated 16.07.2009 passed by the High Court in Writ Petition No. 1688 of 2006, reported in 2009 (4) MPLJ 204

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***438. SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985 – Sections 16 & 22**

A civil suit without the consent of Board of Industrial and Financial Reconstruction (BIFR) is barred without an enquiry u/s 16 pending before the Board (BIFR) – Any judgment rendered by a Civil Court in this circumstance would be *corum non judice* – It is well settled principle of law that a judgment and decree passed by a Court or Tribunal lacking inherent jurisdiction would be a nullity. [Also see *Kiran Singh v. Chaman Paswar, AIR 1954 SC 340, Chief Engineer, Hydel Project v. Ravinder Nath, (2008) 2 SCC 350 and Mantoo Sarkar v. Oriental Insurance Co. Ltd., (2009) 2 SCC 244]*

Managing Director, Bhoruka Textiles Limited v. Kashmiri Rice Industries

Judgment dated 15.05.2009 passed by the Supreme Court in Civil Appeal No. 3603 of 2009, reported in (2009) 7 SCC 521

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***439. SPECIFIC RELIEF ACT, 1963 – Section 20**

Plaintiff filed a suit for specific performance of agreement of sale and for perpetual injunction in respect of agricultural land alleging that defendant No. 1 was recorded as bhumiswami of the suit land and on mediation of father of defendant No. 1, defendant No. 2 entered into an agreement of sale in favour of plaintiff in respect of suit land for a consideration of Rs. 10,000/- – Initially, agreement was oral and possession was delivered to the plaintiff pursuant thereto – On 16.12.1994, an agreement was reduced into writing and defendant No. 2 received entire consideration in cash – On 23.07.1995, defendant No. 2 threatened the plaintiff of dispossession – Defendants Nos. 1 and 2 submitted their joint WS and denied the claim of the plaintiffs – They denied the facts that defendant No. 2 had entered into an agreement of sale in favour of the plaintiff and had delivered the possession and received the consideration – It was further pleaded by the defendants that defendant No. 2 had already entered into an agreement of sale in favour of defendant No. 1 on 16.08.1994 and pursuant thereto a registered sale deed was also executed in favour of defendant No. 1 on 14.03.1995, therefore, the alleged subsequent agreement in favour of plaintiff is void and ineffective – Held, it was for the defendant No. 1 to prove the existence of the alleged agreement dated 16.08.1994 – In absence of such proof, plaintiff was not required to prove that he was bonafide purchaser – Further held, the defendant No. 2 having executed the sale agreement in favour of the plaintiff after receiving consideration is bound to execute registered sale deed.

Omprakash and another v. Dharma Bai and another

Judgment dated 12.08.2009 passed by the High Court in Second Appeal No. 163 of 2000, reported in 2009 (4) MPLJ 75

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***440. STAMP ACT, 1899 – Section 2 (5)**

(i) Distinction between 'bond' and 'promissory note' – If a document has following two characteristics, *viz.*,

(a) it is attested by witnesses; and

(b) it is not payable to order or bearer,

it is a bond, although it may have all the ingredients of a promissory note.

(*Sant Singh v. Madan Das Panika, AIR 1976 JLJ 235 (FB)* relied on)

(ii) Bond, essential ingredients of – A document should be bond if it has following characteristics viz. –

(a) an undertaking to pay a definite sum of the amount;

(b) the payment has to be made to the plaintiff,

(c) it bears signature of the maker,

(d) it has been attested by two witnesses, and

(e) it is not payable to order or bearer.

[Also see *Shantilal v. Vijay Kumar, 2009 (4) MPHT 489 (DB)* and *Ram Kishan Dwivedi v. Rohni Prasad Tiwari and others, 2009 (5) MPHT 38 (DB)*]

(iii) Instrument not duly stamped – Duty of the Court – Section 35 of the Stamp Act empowers the Court to direct the party concerned to pay the stamp duty or deficient portion together with penalty – If the party is not willing or cannot afford to pay as per the order of the Court, the Court has to send the impounded document to the Collector for the purpose of taking further steps in respect of the document as provided in S. 40 of the Act.

(*Peteti Subba Rao v. Anumala S. Narendra, (2002) 10 SCC 427* relied on)

Bhismat Pandey v. Phoola and others

Judgment dated 18.8.2009 passed by the High Court in Writ Petition No. 5947 of 2008, reported in 2009 (4) MPHT 357 (DB)

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***441. STAMP ACT, 1899 – Section 2 (5) (b)**
CONTRACT ACT, 1872 – Section 2 (e)

'Bond' and 'agreement', distinction between – The basic difference between bond and agreement is that in case of bond, in the event of breach, the party to the instrument, who is obliged to pay is liable to pay the sum stipulated in the instrument whereas, in case of agreement, the quantum of damages is to be fixed by the Court.

Shantilal v. Vijay Kumar

Judgment dated 15.05.2009 passed by the High Court in Writ Petition No. 7590 of 2008, reported in 2009 (4) MPHT 489 (DB)

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442. STAMP ACT, 1899 – Sections 27, 64 & 69

Purchase of insurance stamps from outside State for use within State – Permissibility of – Held, purchasing Insurance Stamps from outside State does not amount to an act calculated to deprive the Government of any duty or penalty under the Stamp Act – Offence under Section 64 or 69 not made out – Legal position explained.

V.V.S. Rama Sharma and others v. State of Uttar Pradesh and others

Judgment dated 15.04.2009 passed by the Supreme Court in Criminal Appeal No. 730 of 2009, reported in (2009) 7 SCC 234

Held:

The law which governs the rate of payment of "stamp duty" in respect of policies of insurance and certain other transactions has been dealt with under Entry 91 of List I (Union List) of the Seventh Schedule to the Constitution of India (in short "the Constitution"). It reads as follows:

> "91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts."

Our attention has been drawn towards Entry 63 of List II (State List) of the Seventh Schedule which provides for power to the State Legislatures in regard to the rate of "stamp duty" other than those specified in List I (Union List):

> "63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty."

Other relevant entry which has been cited is Entry 44 of List III (Concurrent List) which excludes "rates of stamp duty":

> "44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty."

The abovementioned various entries in the three lists are the fields of legislation with regard to stamps. They are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures. Under Entry 44 of List III, the power to levy stamp duty on all documents, is concurrent. But the power to prescribe the rate of such levy is excluded from Entry 44 of List III and is divided between Parliament and the State Legislatures.

If the instrument falls under the categories mentioned in Entry 91 of List I, the power to prescribe the rate will belong to Parliament, and for all other instruments or documents, the power to prescribe the rate belongs to the State Legislature under Entry 63 of List II. Therefore, the meaning of Entry 44 of List III is that excluding the power to prescribe the rate, the charging provisions of a law relating to stamp duty can be made both by the Union and the State Legislature, in the concurrent sphere, subject to Article 254 in case of repugnancy.

With regard to the policies of life insurance the rates of stamp duty have been stipulated by Parliament in Schedule I to the Stamp Act though the proceeds thereof are assigned to the States under Article 268 of the Constitution. So, in the case at hand, it is Entry 91 of List I of the Seventh Schedule which would be applicable and the States do not have the power to circumvent a Central law. It has been stated in the FIR that the Divisional Office of LIC, Varanasi has not purchased the insurance stamps from the Treasury Office of U.P., but the same were purchased from the stamp vendors, outside of State, which caused loss to the State exchequer to the tune of Rs. 1,67,21,520.00 to the State Government. So, the sole allegation against the appellants is that they have purchased the insurance stamps from outside the State of U.P. However, the said act of the appellants cannot be said to be inconsistent with any provisions of the Stamp Act or any other rules. So, the allegations made in the FIR even if proved by the prosecution does not constitute any offence.

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***443 STAMP ACT, 1899 – Sections 35, 36 & 61**
TRANSFER OF PROPERTY ACT, 1882 – Section 53-A

(i) Unstamped document – Challenge as to its admissibility, permissibility of – When an unstamped document has been marked as an exhibit and admitted in evidence under the signature of the Court, it is not permissible to the Court, whether it is a Court of Appeal or trial Court, to reject it on the ground that it is not duly stamped or to say that the document has been inadvertently admitted in evidence (*Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655* relied on)

(ii) Joint family (or coparcenary property and separate property) – Joint family or coparcenary property is that in which every co-parcenor has a joint interest and a joint possession – A Hindu, even if he be joint, may posses separate property – In such property, no other member of the co-parcenors not even his male issue, acquire any interest by birth – Such property may be alienated by him.

Champat Giri v. Ramdayal and another

Judgment dated 16.06.2009 passed by the High Court in F.A. No. 810 of 2000, reported in 2009 (4) MPHT 285

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444. TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987 – Section 14 (5)
CRIMINAL PROCEDURE CODE, 1973 – Sections 82 & 299
EVIDENCE ACT, 1872 – Sections 33, 137 & 138

(i) Recording of evidence in absence of accused – Two conditions necessary therefor – Firstly, proof that accused has absconded and secondly, there is no immediate prospect of arresting the accused – Both the conditions contained in Section 299 CrPC must be read with conjunctively and not disjunctively – Satisfaction of one of the condition is not sufficient – Legal requirements explained.

(ii) The term "absconding", meaning thereof – It means to depart secretly or suddenly specially to avoid arrest, prosecution or service of process – Case law reiterated.

Jayendra Vishnu Thakur v. State of Maharashtra and another

Judgment dated 11.05.2009 passed by the Supreme Court in Criminal Appeal No. 981 of 2009, reported in (2009) 7 SCC 104

Held:

Chapter XXIII of the Code provides for evidence in inquiries and trials. Section 273 of the Code mandates that all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance in dispensed with, in the presence of his pleader, which was specifically provided.

Section 299 of the Code expressly provides for the power of the court to record evidence in absence of the accused in the following term:

> *"299. Record of evidence in absence of accused.*—(1) If is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the court competent to try or commit for trial, such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.
>
> (2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the First Class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India."

It is neither in doubt nor in dispute that sub-section (1) of the said provision is in two parts – the first part provides for proof of jurisdictional fact in respect of abscondence of an accused person and the second that there was no immediate prospect of arresting him. In the event, an order under the said provision is passed, deposition of any witness taken in the absence of an accused may be used against him if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without any amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

Now, we must also take notice of Section 33 of the Evidence Act, 1872, which reads as under:

> "33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. – Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the

witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided —

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation. – A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

An accused is, however, always entitled to a fair trial. He is also entitled to a speedy trial but then he cannot interfere with the governmental priority to proceed with the trial which would be defeated by conduct of the accused that prevents it from going forward. In such an event several options are open to courts. What, however, is necessary is to maintain judicial dignity and decorum. The question which arises for consideration is whether the same will take within its umbrage the said principle. We will examine the said question a little later. We will proceed on the premise that for invocation of the provisions of Section 299 of the Code the principle of natural justice is inbuilt in the right of an accused.

A right to cross-examine a witness, apart from being a natural right is statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion. (See *Sarabjit Rick Singh v. Union of India, (2008) 2 SCC 417*]

It is also beyond any cavil that the provisions of Section 299 of the Code must receive strict interpretation, and, thus, scrupulous compliance therewith is imperative in character. It is a well-known principle of interpretation of statute that any word defined in the statutory provision should ordinarily be given the same meaning while construing the other provisions thereof where the same term has been used. Under Section 3 of the Evidence Act like any other fact, the prosecution must prove by leading evidence and a definite categorical finding must

be arrived at by the court in regard to the fact required to be proved by a statute. Existence of an evidence is not enough but application of mind by the court thereupon as also the analysis of the materials and/or appreciation thereof for the purpose of placing reliance upon that part of the evidence is imperative in character.

Indisputably both the conditions contained in the first part of Section 299 of the Code must be read conjunctively and not disjunctively. Satisfaction of one of the requirements should not be sufficient. It was thus, obligatory on the part of the learned court to arrive at a finding on the basis of the materials brought on record by bringing a cogent evidence that the jurisdictional facts existed so as to enable the court concerned to pass an appropriate order on the application filed by the Special Public Prosecutor. [See: *Nirmal Singh v. State of Haryana, (2000) 4 SCC 41*]

Section 14 of TADA Act provides for the procedure and powers of the Designated Court. Sub-section (5) of Section 14 provides for a non obstante clause in terms whereof notwithstanding anything contained in the Code, a Designated Court may, if it things fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination. Section 25 of TADA also provides for a non obstante clause stating that the provisions thereof or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment or in any instrument having effect by virtue of any enactment other than the Act.

On a bare perusal of the provisions of Section 299 of the Code and Section 14(5) of TADA it would be evident that they operate in different fields. The ingredients of the said provisions are different. Materials, which are, thus, required to be brought on record by the prosecution for application of the aforementioned provisions may be different, although they may be overlapping to some extent. In this case the learned Public Prosecutor must be of the opinion that it was not a case where Section 14(5) of TADA shall apply, having regard to the fact that neither the accused nor his pleader was before the court. Although we do not intend to pronounce finally on the point, but it appears to us that Section 14(5) of TADA would be attracted only when the accused is facing trial and/or otherwise represented through his advocate. If neither the accused not has pleader had an occasions to be before the court, sub-section (5) of Section 14 may not be held to have any application.

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***445. TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987 – Section 15**
INDIAN PENAL CODE, 1860 – Section 302 r/w/s 120-B
CRIMINAL TRIAL:
Confessional statement recorded under Section 15 of the TADA Act – Admissibility thereof – Held, it is substantive piece of evidence against the accused and also against the co-accused, abettor or

conspirator – However, in the case of co-accused, though taken as substantive evidence, as a rule of prudence, the Court would look upon corroborative evidence as well – Recording of confession – Compliance of the rules – Held, strict compliance is necessary for the confessional statement which needs no corroboration or contemporaneous record to prove its veracity – However, defects can be cured by the deposition of the officer who recorded the statement. [See *Kartar Singh v. State of Punjab, (1994) 3 SCC 569, State v. Nalini (1999) 5 SCC 253* and *Bharatbhai Bharabhai v. State of Gujarat, (2002) 8 SCC 447*]

Ahmed Hussein Vali Mohammed Saiyed and another v. State of Gujarat

Judgment dated 12.05.2009 passed by the Supreme Court in Criminal Appeal No. 2 of 2003, reported in (2009) 7 SCC 254

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446. TRANSFER OF PROPERTY ACT, 1882 – Section 58

Mortgage by conditional sale – Such condition must be inserted in the same document – By subsequent or separate agreement, such transaction cannot be treated to be a mortgage by conditional sale.

Raj Kumar Bai v. Durga Prasad (deceased by L.Rs.) & Ors.

Judgment dated 26.02.2009 passed by the High Court of M.P. in S.A. No. 358 of 1994, reported in AIR 2009 MP 218

Held:

In order to answer the aforesaid question of law, the Court has to consider the case in view of the provision of Section 58(c) of the Transfer of Property Act which defines the mortgage by conditional sale. The same reads as under :-

> "Sec. 58. "Mortgage".....
>
> (a), (b).....
>
> (c) *Mortgage by conditional sale.*- Where, the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :
>
> Provided that on such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document, which effects or purports, to affect the sale."

In view of the aforesaid definition to hold a transaction to be a mortgage by conditional sale, it is a condition precedent that the condition relating to re-sale of the property must be inserted in the sale-deed itself by which the mortgager created the mortgage of the property with mortgage. In the lack of such condition in the sale-deed or the document of transfer, on the basis of subsequent or the separate agreement, such transaction could not be treated to be a mortgage by conditional sale. Contrary to such statutory provision, either on the pleadings or the evidence of the parties aforesaid transaction could not be held to be a transaction or mortgage by conditional sale.

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***447. TRANSFER OF PROPERTY ACT, 1882 – Section 58 (c)**

Document, nature of – Outright sale or mortgage by conditional sale – Plaintiff filed a suit for redemption of land with averment that his father had mortgaged the suit land vide agreement dated 10.12.1980 for Rs. 1300/- with defendant No.1 – As per the terms of the agreement, plaintiff's father was to return the said amount within four years and the defendant No.1 was not required to act upon the sale deed dated 10.07.1980 executed in respect of the suit land in his favour – It was further pleaded in the plaint that the plaintiff offered Rs. 1300/- to defendant No.1 and requested for release of the mortgaged suit land but the defendant refused to do so – The defendant No. 1 denied the claim of the plaintiff – Held, the registered sale deed contains no condition to the effect that the transaction is mortgaged by conditional sale – The agreement, which is unregistered also, has been executed after more than five months from the date of execution of the sale deed – Cannot be treated to be an agreement of incorporating the condition that the transaction was mortgaged by conditional sale in the registered sale deed – Further held, the condition of the registered sale deed cannot be modified by an unregistered document (agreement).

Jama v. Khalil and others

Judgment dated 23.4.2009 passed by the High Court in Second Appeal No. 124 of 2006, reported in 2009 (4) MPHT 367

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448. TRANSPLANTATION OF HUMAN ORGANS ACT, 1994 – Section 22

Scope of Section 22 of the Act – The provision of the section prohibits taking of cognizance except on a complaint by an appropriate authority or the person – Investigating agency may investigate the offence but cannot file police report u/s 173 (2) Cr.P.C. – Resultantly, provisions of Section 167 (2) Cr.P.C. would not attract.

Jeewan Kumar Raut & Anr. v. Central Bureau of Investigation

Judgment dated 07.07.2009 passed by the Supreme Court in Criminal Appeal No. 1133 of 2009, reported in AIR 2009 SC 2763

Held:

Section 22 of TOHO prohibits taking of cognisance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as laid down therein. Respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of TOHO. If by reason of the provisions of TOHO, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of Sub-section (2) of Section 173 of the Code did not and could not arise. In other words, if no police report could be filed, Sub- section (2) of Section 167 of the Code was not attracted.

For the views we have taken, we are of the opinion that stricto sensu Sub-section (2) of Section 167 of the Code would not apply in a case of this nature. Even assuming for the sake of argument that Sub-section (2) of Section 167 of the Code requires filing of a report within 90 days and the complaint petition having filed within the said period, the requirements thereof stand satisfied.

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449. VAN UPAJ (VYAPAR VINIYAMAN) ADHINIYAM, 1969 – Section 5
Offence u/s 5 of the Adhiniyam, ingredients of – Knowledge of connivance is essential to hold a person guilty of purchasing or transporting of any specified forest produce u/s 5.
Ravi Dubey and others v. State of M.P. and others
Judgment dated 13.05.2009 passed by the High Court in Writ Petition No. 13152 of 2008, reported in 2009 (3) MPLJ 159

Held:

It is therefore, necessary that there has to be a knowledge or connivance, for holding a person guilty of an offence under section 5 of the Act of 1969.

The facts of the present case discloses that trucks of the petitioners were hired by one Smt. Durpati who had in her possession a valid sanction to cut 60 teak trees standing on her land. The trees were then cut in presence of forest officials who also supervised the loading thereof in respective trucks. There trucks were admittedly to be taken to the Depot at Mohad which is at the distance of 17 Kms. The Transit pass were prepared and in the process thereof the trucks were taken to Mohad. It cannot therefore be gathered from these facts that there was any connivance for committing a forest offence.

Since the transit passes were being prepared in the Range Office, Mohda and after the instruction accorded by the DFO to issue transit pass the trucks were loaded with hammer impression in each teak wood and were being carried from the place where they were loaded, i.e., from village Jadiya to Range Office Mohda. All these activities were carried out under the supervision of forest officers who were present on the spot, i.e., in village Jadiya. Therefore, it cannot

be said that the petitioners where unauthorizedly carrying away the forest produce as would invite a forest offence under Section 5 of the Act of 1969.

Therefore, in the considered opinion of this Court no offence can be said to have been made out under Section 5 of the Act of 1969 as would entitle the respondents to proceed with the confiscation of the petitioners' seized trucks.

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450. WAKF ACT, 1995 – Section 85
CIVIL PROCEDURE CODE, 1908 – Section 9
Bar of jurisdiction of Civil Court as provided u/s 85 of the Wakf Act – Includes suit for ejectment of tenant from wakf property – It cannot be confined only with respect to possession based on title of wakf property.
Wakf Imambara Imlipura, Khandwa v. Smt. Khursheeda Bi & Ors. Judgment dated 23.01.2009 passed by the High Court of Madhya Pradesh in W.P. No. 8296 of 2006, reported in AIR 2009 MP 238 (DB)

Held:

Section 85 deals with the bar of jurisdiction of Civil Courts. Section 85 reads thus:

> **85. Bar of jurisdiction of civil courts.** – No suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.

It is apparent from reading of Section 85 that section is two parts. First part provides no suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property. Second part provides that other matter which is required by or under this Act to be determined by a Tribunal. The words "other matter" has been used in the first part as well as in the second part. In the first part user of the words "any dispute, question or other matter" is wide enough to cover within its ken the suit for ejectment also filed by Wakf against a tenant. The second part deals with the other matter which is required by or under this Act to be determined by a Tribunal as provided in Sections 6, 7, 32, 33, 35, 40, 51, 52, 54, 64, 67, and 69. We are unable to accept the submission raised by the counsel that we must read the section in such a way that only such other matter which is required by or under this Act to be determined by a Tribunal governs the bar of jurisdiction of Civil Court which other matters are mentioned in the aforesaid Sections 6, 7, 32, 33, 35, 40, 51, 52, 54, 64, 67 and 69 of the Wakf Act, 1955. The Legislative intention is clear from reading of Sections 83 and 85 the Tribunal is deemed to be a Civil Court and exercises similar powers as may be exercised by the Civil Court under the C.P.C. while trying a suit, execute a decree or order. We cannot confine the bar created by Section 85 with respect to dispute as to title of the

Wakf property or with respect possession based on title of the Wakf property as suggested by the learned counsel. The word 'any' qualifies the 'dispute' which would include suit for ejectment of a tenant from Wakf premises. In any view of the matter such a suit for ejectment would be covered under the phrase "other matter relating to Wakf property". In our opinion, even if status of the tenant is admitted one Section 85 first part ousts the jurisdiction of Civil Court to entertain such a suit for ejectment to tenant, if it is held that in such a suit personal relationship of landlord and tenant is severed any relief for ejectment is held to be incidental the phrase other matter with respect of Wakf property would cover suit for ejectment from Wakf property. Such a proceeding for ejectment of the tenant to be filed before the Tribunal. The *Subhan Singh v. MP Wakf Board, AIR 1997 MP 8* considering Section 55 of Wakf Act, 1954 which is pari-materia to Section 83 of Wakf Act, 1995, it has been held that:

> "18. In other words, in may opinion, the validity of orders made under the provisions of the Act or any rule or order made there-under can be challenged by aggrieved persons before the Tribunal for determination of the dispute relating to Wakf. However, the Mutawalli of a Wakf, or persons interested in a wakf are competent u/S. 55(2) of the Act to approach the (sic) other matters relating to the Wakf. According to me Section 2 of the Act confers discretion to aggrieved person to file an application to the Tribunal only in case he is aggrieved by any order made under this Act or any rule or other made thereunder. However, any Mutawali of a Wakf and person interested in a Wakf can file application to the Tribunal for determination of any disputed question or other matters relating to the Wakf. Even in case of persons aggrieved, he can file an application to the Tribunal only in case the order passed under the Act, rule or order made thereunder is in relation to the Wakf Property. In my opinion, in case the power of the Tribunal is confined for determination of only those disputes which are required to be determined under the specific provision of the Act, rule or order made thereunder is in relation to the Wakf Property, it will lead to rendering the provision of Section 55(2) of the Act superfluous. Legislature does not waste words and I do not have any compelling reason to adopt a course of interpretation to render the provisions of Section 55(2) of the Act, superfluous. As I have held earlier both operate in the different field.
>
> 19. Learned counsels for the plaintiffs have further submitted that relief sought for by them in the Civil Courts cannot be adjudicated by the Tribunal and in that view of

the matter even if the Tribunal has got the power u/S 5(1) and (2) of the Act the suits and the proceedings cannot be transferred. In the submission of the learned counsels when the Tribunal is not competent to grant relief sought for in the Civil Court the necessary corollary of the same in their submission shall be that the Tribunal shall have no power. The whole premises on which the learned counsels have proceeded is unfounded and they totally ignore the provisions of Section 55(5) of the Act as amended. Under Section 55(5) of the Act the Tribunal is deemed to be a Civil Court and has the same power as that of a Civil Court under the Code of Civil Procedure, while trying the suit or executing the decree or order. In view of the aforesaid specific provisions, I do not have slightest hesitation in holding that the relief which can be granted by the Civil Court can also be granted by the Tribunal."

In *Subhan Singh v. MP Wakf Board,* (supra), single Judge of this Court has also opined that in a suit for grant of permanent injunction restraining the defendants or their agents from dismantling the roof of the shop or cause any damage to it has held that the Tribunal is not competent to hear such a dispute as such relief sought for by the plaintiff cannot be granted by the Tribunal. Relief sought was for permanent injunction restraining the tenant from abolishing the shop. Plaintiff was a tenant in a shop which was wakf property. It was held by this Court that plaintiff was neither Mutwalli or person interested in the wakf and cannot come within the expression 'persons aggrieved by any order made under the Act or any rule or order made thereunder' as provided in Section 83. Thus, cannot file an application before the Tribunal for grant of relief sought for in the Civil Suit. Thus, it was held that the Civil Court was right in not transferring the suit in the Tribunal. Facts were different in the aforesaid decision. In the instant suit, the suit is for ejectment and such a suit, in our opinion would lie before the Tribunal, even as per reasoning given with respect to interpretation of Section 55 of the Act of 1954 in paras 18 and 19 of the report (supra).

In the circumstances, I am of the opinion that the bar created by Section 85 of the Wakf Act, 1995 does not apply in the present case, which pertains to a suit for eviction of the tenant from the disputed shop after determination of the tenancy/lease. As such, in my opinion, the submissions made by the learned counsel for the petitioner (defendant) in this regard, cannot be accepted.

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NOTE: Asterisk (*) denotes brief notes.

PART - III

CIRCULARS/NOTIFICATIONS

वाहनों के अग्रशीर्ष भाग पर बत्ती के उपयोग संबंधी परिवहन विभाग मंत्रालय, वल्लभ भवन, भोपाल की दिनांक 14 अगस्त 2002 की मूल अधिसूचना (मध्यप्रदेश राजपत्र, दिनांक 23 अगस्त 2002 में प्रकाशित)

क्र. एफ–22–39–98–आठ.– केन्द्रीय मोटरयान नियम, 1989 के नियम 108 द्वारा प्रदत्त शक्तियों के अनुसरण में, राज्य शासन इस विभाग की तत्संबंधी समस्त पूर्व अधिसूचनाओं को अधिक्रमित करते हुए एतद् द्वारा, यान पर निम्नलिखित का प्रयोग करने की अनुज्ञा प्रदान करता है :–

(क) यान के शीर्ष अग्र भाग पर, लाल बत्ती जब यान प्रदेश में कहीं भी ड्यूटी पर हो :–

1. राज्यपाल
2. मुख्यमंत्री
3. मध्यप्रदेश उच्च न्यायालय के मुख्य न्यायाधीश
4. विधानसभा अध्यक्ष
5. मध्यप्रदेश के मंत्रीगण/राज्य मंत्रीगण
6. विधान सभा के उपाध्यक्ष
7. मध्यप्रदेश उच्च न्यायालय के समस्त न्यायाधीश
8. लोकायुक्त /उपलोकायुक्त
9. मध्यप्रदेश के उपमंत्रीगण/ संसदीय सचिव
10. नेता प्रतिपक्ष, विधानसभा
11. भूतपूर्व मुख्यमंत्री
12. उपाध्यक्ष, राज्य योजना मण्डल
13. अध्यक्ष, लोक सेवा आयोग
14. राज्य निर्वाचन आयुक्त
15. महाधिवक्ता
16. मुख्य सचिव
17. अध्यक्ष, राजस्व मण्डल
18. प्रमुख सचिव, गृह
19. प्रमुख सचिव/ सचिव विधान सभा
20. पुलिस महानिदेशक, मध्यप्रदेश
21. जनरल आफीसर कमांडिंग तथा कमाण्डेंट्स जो ब्रिगेडियर अथवा उसके ऊपर का पद धारित हो
22. मुख्य आयकर आयुक्त, भोपाल/ इन्दौर एवं महानिदेशक, आयकर (अनुसंधान)
23. प्रधान महालेखाकार, मध्यप्रदेश (लेखा/लेख परीक्षा)

(ख) यान के शीर्ष अग्र भाग पर, पीली बत्ती (उनके अधिकार क्षेत्र में) :–

1. राज्य शासन द्वारा गठित आयोगों के अध्यक्ष एवं सदस्य
2. राज्य शासन द्वारा गठित विभिन्न निगम, मण्डल एवं प्राधिकरणों के अध्यक्ष
3. संभागीय आयुक्त
4. सदस्य, राजस्व मण्डल, मध्यप्रदेश
5. परिवहन आयुक्त
6. आबकारी आयुक्त
7. क्षेत्रीय पुलिस महानिरीक्षक/महानिरीक्षक अग्नि शमन सेवा
8. जिलाध्यक्ष/जिला दण्डाधिकारी

9. जिला एवं सत्र न्यायाधीश एवं मुख्य न्यायिक दण्डाधिकारी
10. पुलिस अधीक्षक
11. महापौर, नगरपालिक निगम
12. अध्यक्ष, नगरपालिक निगम
13. जिला पंचायत अध्यक्ष एवं उपाध्यक्ष
14. राज्य शिष्टाचार अधिकारी
15. उप परिवहन आयुक्त
16. अतिरिक्त जिला दण्डाधिकारी /अनुविभागीय दण्डाधिकारी/ एवं समस्त कार्यपालिक दण्डाधिकारी
17. अतिरिक्त पुलिस अधीक्षक /अनुविभागीय अधिकारी पुलिस/ नगर पुलिस अधीक्षक
18. क्षेत्रीय/ अतिरिक्त /जिला परिवहन अधिकारी/ परिवहन एवं वन विभाग के उड़नदस्तों के प्रभारी अधिकारी
19. जिला सेनानी होमगार्ड
20. नगर निरीक्षक, पुलिस/फायर आफीसर

(ग) रोगियों को ले जाने के लिए प्रयुक्त एंबुलेंस में लगाई गई परपल ग्लास वाली ब्लिंकर किस्म की लाल लाइट।

(घ) टॉपलाईट के रूप में फ्लेशर सहित या रहित नीली लाइट का उपयोग उन अति गणमान्य व्यक्तियों की एसकोर्टिंग करने वाले यानों तक सीमित होगा जो लाल लाइट का उपयोग करने के हकदार हैं।

(ड) उस दशा में जब यान गणमान्य व्यक्तियों को नहीं ले जा रहा हो, यथास्थिति, लाल, नीली या पीली लाइट का उपयोग नहीं किया जाएगा और उसे काले आवरण से ढका जाएगा।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
जे.एन. मालपानी, उपसचिव

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मध्यप्रदेश के न्यायिक अधिकारियों को वाहन के अग्र शीर्ष भाग पर पीली बत्ती के प्रयोग की अनुज्ञा संबंधी परिवहन विभाग, मंत्रालय, वल्लभ भवन, भोपाल की दिनांक 27 अक्टूबर 2009 की अधिसूचना

(मध्यप्रदेश राजपत्र, दिनांक 30 अक्टूबर 2009 में प्रकाशित)

क्र.एफ 22–05–2008–आठ, – परिवहन विभाग की अधिसूचना क्रमांक एफ 22–39–98–आठ, दिनांक 14 अगस्त 2002 के तारतम्य में केन्द्रीय मोटरयान नियम, 1989 के नियम, 108 द्वारा प्रदत्त शक्तियों के अनुसरण में, राज्य शासन, एतद् द्वारा, (1) अध्यक्ष, मध्यप्रदेश मध्यस्थम अधिकरण के वाहन के अग्र शीर्ष भाग पर लाल बत्ती प्रयोग करने तथा (2) प्रदेश के सभी न्यायिक अधिकारियों को उनके कार्य क्षेत्र में वाहन के अग्र शीर्ष भाग पर पीली बत्ती के प्रयोग करने की अनुज्ञा प्रदान करता है।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,
दिलीप राज द्विवेदी, उपसचिव

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE GRAMNYAYALAYAS ACT, 2008

No.4 OF 2009*

[7th January, 2009.]

An Act to provide for the establishment of Gram Nyayalayas at the grass roots level for the purposes of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fifty-ninth Year of the Republic of India as follows:-

CHAPTER I

Preliminary

1. Short title, extent and commencement. – (1) This Act may be called the Gram Nyayalayas Act, 2008.

(2) It extends to the whole of India except the State of Jammu and Kashmir, the State of Nagaland, the State of Arunachal Pradesh, the State of Sikkim and to the tribal areas.

Explanation.– In this sub-section, the expression "tribal areas" means the areas specified in Parts I, II, IIA and III of the Table below paragraph 20 of the Sixth Schedule to the Constitution within the State of Assam, the State of Meghalaya, the State of Tripura and the State of Mizoram, respectively.

(3) It shall come into force on such date as the Central Government may, by notification published in the Official Gazette, appoint; and different dates may be appointed for different States.

2. Definitions.– In this Act, unless the context otherwise requires, –

(a) "Gram Nyayalaya" means a court established under sub-section (1) of section 3;

(b) "Gram Panchayat" means an institution (by whatever name called) of self-government constituted, at the village level, under Article 243B of the Constitution, for the rural areas;

(c) "High Court" means,–

(i) in relation to any State, the High Court for that State;

(ii) in relation to a Union territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court;

(iii) in relation to any other Union territory, the highest Court of criminal appeal for that territory other than the Supreme Court of India;

* The following Act of Parliament Received the assent of the President on the 7th January, 2009.

(d) "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;

(e) "Nyayadhikari" means the presiding officer of a Gram Nyayalaya appointed under section 5;

(f) "Panchayat at intermediate level" means an institution (by whatever name called) of self-government constituted, at the intermediate level, under Article 243B of the Constitution, for the rural areas in accordance with the provisions of Part IX of the Constitution;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "Schedule" means the Schedule appended to this Act;

(I) "State Government", in relation to a Union territory, means the administrator thereof appointed under Article 239 of the Constitution;

(j) words and expressions used herein and not defined but defined in the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973 shall have the meanings respectively assigned to them in those Codes.

CHAPTER II

Gram Nyayalaya

3. Establishment of Gram Nyayalayas. – (1) For the purpose of exercising the jurisdiction and powers conferred on a Gram Nyayalaya by this Act, the State Government, after consultation with the High Court, may, by notification, establish one or more Gram Nyayalayas for every Panchayat at intermediate level or a group of contiguous Panchayats at intermediate level in a district or where there is no Panchayat at intermediate level in any State, for a group of contiguous Gram Panchayats.

(2) The State Government shall, after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a Gram Nyayalaya shall extend and may, at any time, increase, reduce or alter such limits.

(3) The Gram Nyayalayas established under sub-section (1) shall be in addition to the courts established under any other law for the time being in force.

4. Headquarters of Gram Nyayalaya. – The headquarters of every Gram Nyayalaya shall be located at the headquarters of the intermediate Panchayat in which the Gram Nyayalaya is established or such other place as may be notified by the State Government.

5. Appointment of Nyayadhikari. – The State Government shall, in consultation with the High Court, appoint a Nyayadhikari for every Gram Nyayalaya.

6. Qualifications for appointment of Nyayadhikari. – (1) A person shall not be qualified to be appointed as a Nyayadhikari unless he is eligible to be appointed as a Judicial Magistrate of the first class.

(2) While appointing a Nyayadhikari, representation shall be given to the members of the Scheduled Castes, the Scheduled Tribes, women and such other classes or communities as may be specified by notification, by the State Government from time to time.

7. Salary, allowances and other terms and conditions of service of Nyayadhikari. – The salary and other allowances payable to, and the other terms and conditions of service of, a Nyayadhikari shall be such as may be applicable to the Judicial Magistrate of the first class.

8. Nyayadhikari not to preside over proceedings in which he is interested. – The Nyayadhikari shall not preside over the proceedings of a Gram Nyayalaya in which he has any interest or is otherwise involved in the subject matter of the dispute or is related to any party to such proceedings and in such a case, the Nyayadhikari shall refer the matter to the District Court or the Court of Session, as the case may be, for transferring it to any other Nyayadhikari.

9. Nayadhikari to hold mobile courts and conduct proceedings in villages. – (1) The Nyayadhikari shall periodically visit the villages falling under his jurisdiction and conduct trial or proceedings at any place which he considers is in close proximity to the place where the parties ordinarily reside or where the whole or part of the cause of action had arisen:

Provided that where the Gram Nyayalaya decides to hold mobile court outside its headquarters, it shall give wide publicity as to the date and place where it proposes to hold mobile court.

(2) The State Government shall extend all facilities to the Gram Nyayalaya including the provision of vehicles for holding mobile court by the Nyayadhikari while conducting trial or proceedings outside its headquarters.

10. Seal of Gram Nyayalaya.– Every Gram Nyayalaya established under this Act shall use a seal of the court in such form and dimensions as may be prescribed by the High Court with the approval of the State Government.

CHAPTER III

Jurisdiction, Powers And Authority of Gram Nyayalaya

11. Jurisdiction of Gram Nyayalaya.– Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or the Code of Civil Procedure, 1908 or any other law for the time being in force, the Gram Nyayalaya shall exercise both civil and criminal jurisdiction in the manner and to the extent provided under this Act.

12. Criminal Jurisdiction. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force, the Gram Nyayalaya may take cognizance of an offence on a complaint or on a police report and shall –

(a) try all offences specified in Part I of the First Schedule; and

(b) try all offences and grant relief, if any, specified under the enactments included in Part II of that Schedule.

(2) Without prejudice to the provisions of sub-section (1), the Gram Nyayalaya shall also try all such offences or grant such relief under the State Acts which may be notified by the State Government under sub-section (3) of section 14.

13. Civil Jurisdiction. – (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, and subject to sub-section (2), the Gram Nyayalaya shall have jurisdiction to –

(a) try all suits or proceedings of a civil nature falling under the classes of disputes specified in Part I of the Second Schedule;

(b) try all classes of claims and disputes which may be notified by the Central Government under sub-section (1) of section 14 and by the State Government under sub-section (3) of the said section.

(2) The pecuniary limits of the Gram Nyayalaya shall be such as may be specified by the High Court, in consultation with the State Government, by notification, from time to time.

14. Power to amend Schedules. – (1) Where the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification, add to or omit any item in Part I or Part II of the First Schedule or Part II of the Second Schedule, as the case may be, and it shall be deemed to have been amended accordingly.

(2) Every notification issued under sub-section (1) shall be laid before each House of Parliament.

(3) If the State Government is satisfied that it is necessary or expedient so to do, it may, in consultation with the High Court, by notification add to any item in Part III of the First Schedule or Part III of the Second Schedule or omit from it any item in respect of which the State Legislature is competent to make laws and thereupon the First Schedule or the Second Schedule, as the case may be, shall be deemed to have been amended accordingly.

(4) Every notification issued under sub-section (3) shall be laid before the State Legislature.

15. Limitation. – (1) The provisions of the Limitation Act, 1963 shall be applicable to the suits triable by the Gram Nyayalaya.

(2) The provisions of Chapter XXXVI of the Code of Criminal Procedure, 1973 shall be applicable in respect of the offences triable by the Gram Nyayalaya.

16. Transfer of pending proceedings. – (1) The District Court or the Court of Session, as the case may be, with effect from such date as may be notified by the High Court, may transfer all the civil or criminal cases, pending before the courts subordinate to it, to the Gram Nyayalaya competent to try or dispose of such cases.

(2) The Gram Nyayalaya may, in its discretion, either retry the cases or proceed from the stage at which it was transferred to it.

17. Duties of ministerial officers. – (1) The State Government shall determine the nature and categories of the officers and other employees required to assist a Gram Nyayalaya in the discharge of its functions and provide the Gram Nyayalaya with such officers and other employees as it may think fit.

(2) The salaries and allowances payable to, and other conditions of service of, the officers and other employees of the Gram Nyayalaya shall be such as may be prescribed by the State Government.

(3) The officers and other employees of a Gram Nyayalaya shall perform such duties as may, from time to time, be assigned to them by the Nyayadhikari.

CHAPTER IV
Procedure in Criminal Cases

18. Overriding effect of Act in criminal trial. – The provisions of this Act shall have effect notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law, but save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a Gram Nyayalaya; and for the purpose of the said provisions of the Code, the Gram Nyayalaya shall be deemed to be a Court of Judicial Magistrate of the first class.

19. Gram Nyayalaya to follow summary trial procedure. – (1) Notwithstanding anything contained in sub-section (1) of section 260 or sub-section (2) of section 262 of the Code of Criminal Procedure, 1973, the Gram Nyayalaya shall try the offences in a summary way in accordance with the procedure specified in Chapter XXI of the said Code and the provisions of sub-section (1) of section 262 and sections 263 to 265 of the said Code, shall, so far as may be, apply to such trial.

(2) When, in the course of a summary trial, it appears to the Nyayadhikari that the nature of the case is such that it is undesirable to try it summarily, the Nyayadhikari shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided under the Code of Criminal Procedure, 1973.

20. Plea bargaining before Gram Nyalaya.– A person accused of an offence may file an application for plea bargaining in Gram Nyayalaya in which such offence is pending trial and the Gram Nyayalaya shall dispose of the case in accordance with the provisions of Chapter XXIA of the Code of Criminal Procedure, 1973.

21. Conduct of cases in Gram Nyayalaya and legal aid to parties. – (1) For the purpose of conducting criminal cases in the Gram Nyayalaya on behalf of the Government, the provisions of section 25 of the Code of Criminal Procedure, 1973 shall apply.

(2) Notwithstanding anything contained in sub-section (1), in a criminal proceeding before the Gram Nyayalaya, the complainant may engage an advocate of his choice at his expense to present the case of prosecution with the leave of the Gram Nyayalaya.

(3) The State Legal Services Authority, constituted under section 6 of the Legal Services Authorities Act, 1987, shall prepare a panel of advocates and assign at least two of them to be attached to each Gram Nyayalaya so that their services may be provided by the Gram Nyayalaya to the accused unable to engage an advocate.

22. Pronouncement of Judgment. – (1) The judgment in every trial shall be pronounced by the Nyayadhikari in open court immediately after the termination of the trial or at any subsequent time, not exceeding fifteen days, of which notice shall be given to the parties.

(2) The Gram Nyayalaya shall deliver a copy of its judgment immediately to both the parties free of cost.

CHAPTER V

Procedure in Civil Cases

23. Overriding effect of Act in Civil Proceedings. – The provisions of this Act shall have effect notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law, but save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a Gram Nyayalaya; and for the purpose of the said provisions of the Code, the Gram Nyayalaya shall be deemed to be a civil court.

24. Special Procedure in Civil Disputes.– (1) Notwithstanding anything contained in any other law for the time being in force, every suit, claim or dispute under this Act shall be instituted by making an application to the Gram Nyayalaya in such form, in such manner, and accompanied by such fee, not exceeding rupees one hundred, as may be prescribed by the High Court, from time to time, in consultation with the State Government.

(2) Where a suit, claim or dispute has been duly instituted, a summons shall be issued by the Gram Nyayalaya, accompanied by a copy of the application made under sub-section (*l*), to the opposite party to appear and answer the claim by such date as may be specified therein and the same shall be served in such manner as may be prescribed by the High Court.

(3) After the opposite party files his written statement, the Gram Nyayalaya shall fix a date for hearing and inform all the parties to be present in person or through their advocates.

(4) On the date fixed for hearing, the Gram Nyayalaya shall hear both the parties in regard to their respective contentions and where the dispute does not require recording of any evidence, pronounce the judgment; and in case where it requires recording of evidence, the Gram Nyayalaya shall proceed further.

(5) The Gram Nyayalaya shall also have the power,-

(a) to dismiss any case for default or to proceed ex parte; and

(b) to set aside any such order of dismissal for default or any order passed by it for hearing the case ex parte.

(6) In regard to any incidental matter that may arise during the course of the proceedings, the Gram Nyayalaya shall adopt such procedure as it may deem just and reasonable in the interest of justice.

(7) The proceedings shall, as far as practicable, be consistent with the interests of justice and the hearing shall be continued on a day-to-day basis until its conclusion, unless the Gram Nyayalaya finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded in writing.

(8) The Gram Nyayalaya shall dispose of the application made under sub-section (1) within a period of six months from the date of its institution.

(9) The judgment in every suit, claim or dispute shall be pronounced in open court by the Gram Nyayalaya immediately after conclusion of hearing or

at any subsequent time, not exceeding fifteen days, of which notice shall be given to the parties.

(10) The judgment shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision.

(11) A copy of the judgment shall be delivered free of cost to both the parties within three days from the date of pronouncement of the judgment.

25. Execution of decrees and orders of Gram Nyayalaya. – (I) Notwithstanding anything contained in the Code of Civil Procedure, 1908 judgment passed by a Gram Nyayalaya shall be deemed to be a decree and it shall be executed by a Gram Nyayalaya as a decree of the civil court and for this purpose, the Gram Nyayalaya shall have all the powers of a civil court.

(2) The Gram Nyayalaya shall not be bound by the procedure in respect of execution of a decree as provided in the Code of Civil Procedure, 1908 and it shall be guided by the principles of natural justice.

(3) A decree may be executed either by the Gram Nyayalaya which passed it or by the other Gram Nyayalaya to which it is sent for execution.

26. Duty of Gram Nyayalaya to make efforts for conciliation and settlement of civil disputes. – (1) In every suit or proceeding, endeavour shall be made by the Gram Nyayalaya in the first instance, where it is possible to do so, consistent with the nature and circumstances of the case, to assist, persuade and conciliate the parties in arriving at a settlement in respect of the subject matter of the suit, claim or dispute and for this purpose, a Gram Nyayalaya shall follow such procedure as may be prescribed by the High Court.

(2) Where in any suit or proceeding, it appears to the Gram Nyayalaya at any stage that there is a reasonable possibility of a settlement between the parties, the Gram Nyayalaya may adjourn the proceeding for such period as it thinks fit to enable them to make attempts to effect such a settlement.

(3) Where any proceeding is adjourned under sub-section (2), the Gram Nyayalaya may, in its discretion, refer the matter to one or more Conciliators for effecting a settlement between the parties.

(4) The power conferred by sub-section (2) shall be in addition to, and not in derogation of, any other power of the Gram Nyayalaya to adjourn the proceeding.

27. Appointment of Conciliators. – (1) For the purposes of section 26, the District Court shall, in consultation with the District Magistrate, prepare a panel consisting of the names of social workers at the village level having integrity for appointment as Conciliators who possess such qualifications and experience as may be prescribed by the High Court.

(2) The sitting fee and other allowances payable to, and the other terms and conditions for engagement of, Conciliators shall be such as may be prescribed by the State Government.

28. Transfer of civil disputes. – The District Court having jurisdiction may, on an application made by any party or when there is considerable pendency of cases in one Gram Nyayalaya or whenever it considers necessary in the interests of justice, transfer any case pending before a Gram Nyayalaya to any other Gram Nyayalaya within its jurisdiction.

CHAPTER VI
Procedure Generally

29. Proceedings to be in the official language of the State. – The proceedings before the Gram Nyayalaya and its judgment shall, as far as practicable, be in one of the official languages of the State other than the English language.

30. Application of Indian Evidence Act, 1872. – A Gram Nyayalaya may receive as evidence any report, statement, document, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872.

31. Record of oral evidence. – In suits or proceedings before a Gram Nyayalaya, it shall not be necessary to record the evidence of witnesses at length, but the Nyayadhikari, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of substance of what the witness deposes, and such memorandum shall be signed by the witness and the Nyayadhikari and it shall form part of the record.

32. Evidence of formal character on affidvait.– (1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Gram Nyayalaya.

(2) The Gram Nyayalava may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding, summon and examine any such person as to the facts contained in his affidavit.

CHAPTER VII
Appeals

33. Appeal in criminal cases. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law, no appeal shall lie from any judgment, sentence or order of a Gram Nyayalaya except as provided hereunder.

(2) No appeal shall lie where –

(a) an accused person has pleaded guilty and has been convicted on such plea;

(b) the Gram Nyayalaya has passed only a sentence of fine not exceeding one thousand rupees.

(3) Subject to sub-section (2), an appeal shall lie from any other judgment, sentence or order of a Gram Nyayalaya to the Court of Session.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of judgment, sentence or order of a Gram Nyayalaya:

Provided that the Court of Session may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(5) An appeal preferred under sub-section (3) shall be heard and disposed of by the Court of Session within six months from the date of filing of such appeal.

(6) The Court of Session may, pending disposal of the appeal, direct the suspension of the sentence or order appealed against.

(7) The decision of the Court of Session under sub-section (5) shall be final and no appeal or revision shall lie from the decision of the Court of Session:

Provided that nothing in this sub-section shall preclude any person from availing of the judicial remedies available under Articles 32 and 226 of the Constitution.

34. Appeal in Civil Cases. – (1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law, and subject to sub-section (2), an appeal shall lie from every judgment or order, not being an interlocutory order, of a Gram Nyayalaya to the District Court.

(2) No appeal shall lie from any judgment or order passed by the Gram Nyayalaya –

(a) with the consent of the parties;

(b) where the amount or value of the subject matter of a suit, claim or dispute does not exceed rupees one thousand;

(c) except on a question of law, where the amount or value of the subject matter of such suit, claim or dispute does not exceed rupees five thousand.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Gram Nyayalaya:

Provided that the District Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(4) An appeal preferred under sub-section (1) shall be heard and disposed of by the District Court within six months from the date of filing of the appeal.

(5) The District Court may, pending disposal of the appeal, stay execution of the judgment or order appealed against.

(6) The decision of the District Court under sub-section (4) shall be final and no appeal or revision shall lie from the decision of the District Court:

Provided that nothing in this sub-section shall preclude any person from availing of the judicial remedies available under Articles 32 and 226 of the Constitution.

CHAPIER VIII
Miscellaneous

35. Assistance of police to Gram Nyayalayas. – (1) Every police officer functioning within the local limits of jurisdiction of a Gram Nyayalaya shall be bound to assist the Gram Nyayalaya in the exercise of its lawful authority.

(2) Whenever the Gram Nyayalaya, in the discharge of its functions, directs a revenue officer or police officer or Government servant to provide assistance to the Gram Nyayalaya, he shall be bound to provide such assistance.

36. Nyayadhikaris and employees, etc. to be public servants.– The Nyayadhikaris and the officers and other employees of the Gram Nyayalayas shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act, to be public servants within the meaning of section 21 of the Indian Penal Code.

37. Inspection of Gram Nyayalayas. – The High Court may authorise any judicial officer superior in rank to the Nyayadhikari to inspect the Gram Nyayalayas within his jurisdiction once in every six months or such other period as the High Court may prescribe and issue such instructions, as he considers necessary and submit a report to the High Court.

38. Power to remove difficulties. – (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as may appear to it to be necessary or expedient for removing the difficulty:

Provided that no order shall be made under this section after the expiry of a period of three years from the date of commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

39. Power of High Court to make rules. – (1) The High Court may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the form and dimensions of the seal of the Gram Nyayalaya under section 10;

(b) the form, the manner and the fee for institution of suit, claim or proceeding under sub-section (1) of section 24;

(c) manner of service on opposite party under sub-section (2) of section 24;

(d) procedure for conciliation under sub-section (1) of section 26;

(e) qualifications and experience of Conciliators under sub-section (1) of section 27;

(f) the period for inspection of Gram Nyayalayas under section 37.

(3) Every notification issued by the High Court shall be published in the Official Gazette.

40. Power of State Government to make rules. – (1) The State Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Gram Nyayalayas under sub-section (2) of section 17;

(b) the sitting fee and other allowances payable to, and the other terms and conditions for engagement of, Conciliators under sub-section (2) of section 27.

(3) Every rule made by the State Government under this Act shall be laid as soon as may be after it is made, before the State Legislature.

THE FIRST SCHEDULE

(See Sections 12 and 14)

PART - I

Offences Under the Indian Penal Code (45 of 1860), etc.

(i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(ii) theft, under section 379, section 380 or section 381 of the Indian Penal Code (45 of 1860), where the value of the property stolen does not exceed rupees twenty thousand;

(iii) receiving or retaining stolen property, under section 411 of the Indian Penal Code (45 of 1860), where the value of the property does not exceed rupees twenty thousand;

(iv) assisting in the concealment or disposal of stolen property, under section 414 of the Indian Penal Code (45 of 1860), where the value of such property does not exceed rupees twenty thousand;

(v) offences under sections 454 and 456 of the Indian Penal Code (45 of 1860);

(vi) insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, punishable with imprisonment for a term which may extend to two years, or with fine, or with both, under section 506 of the Indian Penal Code (45 of 1860);

(vii) abetment of any of the foregoing offences;

(viii) an attempt to commit any of the foregoing offences, when such attempt is an offence.

PART II

Offences and relief under the other Central Acts

(i) any offence constituted by an act in respect of which a complaint may be made under section 20 ofthe Cattle-trespass Act, 1871 (1 of 187l);

(ii) the Payment of Wages Act, 1936 (4 of 1936);

(iii) the Minimum Wages Act, 1948 (11 of 1948);

(iv) the Protection of Civil Rights Act, 1955 (22 of 1955);

(v) order for maintenance of wives, children and parents under Chapter IX ofthe Code of Criminal Procedure, 1973 (2 of 1974);

(vi) the Bonded Labour System (Abolition) Act, 1976 (19 of 1976);

(vii) the Equal Remuneration Act, 1976 (25 of 1976);

(viii) the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).

PART III

Offences and relief under the State Acts
(To be notified by the State Government)

THE SECOND SCHEDULE

(See Sections 13 and 14)

PART I

SUITS OF A CIVIL NATUREWITHINTHE JURISDICTION OF GRAM NYAYALAYAS

(I) Civil Disputes:

(a) right to purchase of property;

(b) use of common pasture;

(c) regulation and timing of taking water from irrigation channel.

(ii) Property Disputes:

(a) village and farm houses (Possession);

(b) water channels;

(c) right to draw water from a well or tube well.

(iil) Other Disputes:

(a) claims under the Payment of Wages Act, 1936 (4 of I936);

(b) claims under the Minimum Wages Act, 1948 (II of I948);

(c) money suits either arising from trade transaction or money lending;

(d) disputes arising out of the partnership in cultivation of land;

(e) disputes as to the use offorest produce by inhabitants of Gram Panchayats.

PART II

Claims and Disputes under the Central Acts Notified under Sub-Section (1) of Section 14 by the Central Government

(To be notified by the Central Government)

PART III

Claims and Disputes under the State Acts Notified under sub-Section (3) of Section 14 by the State Government

(To be notified by the State Government)

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